LIBRARY
SUPT. U. S.

Office-Supreme Court, U.S.
FILED
DEC 26 1962
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 694

NORTHEAST AIRLINES, INC.,

Petitioner,

—against—

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of JOHN S. PEARSON, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. JUNKERMAN
Counsel for Petitioner
80 Broad Street,
New York 4, N.Y.

INDEX

	PAGE
Citations to Opinions Below	2
Basis of Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	5
Reasons for Granting the Writ	8
The question presented is a novel one, involving issues of Constitutional law which have never been passed upon by this Court, and to which (until now) the answer had been assumed to be directly contrary to the answer given by the court below	10
The question presented is an important one which has been or will be presented in every case where one state is required to apply the laws of another state	13
The decision below has resolved conflicts between the policies of two states, and between the policy of the United States Constitution and the local policy of New York, in a manner which cannot be supported	15
Conclusion	19

Appendix A — PAGE

District Court Opinion Denying Limitations and Directed Verdict for Plaintiff (199 F. Supp. 539) A-1

District Court Opinion Denying Motion for Judgment *N.O.V.* or for New Trial (201 F. Supp. 45) A-5

Opinion of Original Panel of Court of Appeals (307 F.2d 131) A-9

Dissenting Opinion of Original Panel of Court of Appeals A-20

Opinion of Court of Appeals *En Banc* A-43

Dissenting Opinion of Court of Appeals *En Banc* A-63

Appendix B

New York Court of Appeals Opinion in *Kilberg* v. *Northeast Airlines*, 9 N.Y.2d 34 ..... B-1

Concurring Opinion per Fuld, J., in *Kilberg* v. *Northeast Airlines* B-8

Concurring Opinion per Froessel, J., in *Kilberg* v. *Northeast Airlines* B-13

New York Court of Appeals Opinion in *Davenport* v. *Webb*, 11 N.Y.2d 392 ..... B-21

Concurring and Dissenting Opinions in *Davenport* v. *Webb* B-25

CASES

PAGE

Bagley v. *Small*, 92 N.H. 107, 26 A. 2d 23 (1942) 10

Barnes v. *Union Pac. Ry. Co.*, 139 F. Supp. 198 (D. Utah 1956) 10

Caldwell v. *Abernathy*, 231 N.C. 692, 58 S.E.2d 763 (1950) 10

Curtis v. *Campbell*, 76 F.2d 84 (3rd Cir. 1935) 10

Davenport v. *Webb*, 11 N.Y.2d 392, 183 N.E.2d 902 (1962) 9

Goranson v. *Kloeb*, 308 F.2d 655 (6th Cir. 1962) 14

Hughes v. *Fetter*, 341 U.S. 609 (1951) 16

Kilberg v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E. 2d 526 (1961) 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18

Maynard v. *Eastern Air Lines, Inc.*, 178 F.2d 139 (2d Cir. 1949) 10

Popkin v. *Eastern Air Lines, Inc.*, 204 F. Supp. 426 (E.D. Pa. 1962) 13

Richards v. *United States*, 285 F.2d 525 (10th Cir. 1960), aff'd 369 U.S. 1 (1962) 10, 11, 12

Stoltz v. *Burlington*, 178 F.2d 514 (10th Cir. 1949) .. 10

Tillinghast v. *Maggs*, 82 R.I. 428, 111 A. 2d 713 (1955) 10

Trauth v. *Northeast Airlines, Inc.*, Civ. No. 142-256 (SDNY 1961) 19

Wellman v. *Mead*, 93 Vt. 322, 107 A. 396 (1919) 10

Other Authorities

PAGE

United States Constitution

Article IV, Section 1 ..... 2, 3, 10, 11, 15, 16, 18, 19
Article IV, Section 2 18
Amendment XIV, Section 1 4

United States Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1738 ..... 2, 4, 15, 18

State Statutes

Massachusetts General Laws, Ter. ed., Chapter 229, section 2 ..... 3, 5, 6, 17

Miscellaneous

Commonwealth of Massachusetts, General Court of 1962, Bulletin of Committee Work and Business of the Legislature, (Final Ed., 1962 Sess.) 17

Mass. Judicial Council, 37th Report (1961) 17

State of New York,
Ass. Int. 3512, Pr. No. 4[illegible] (1960) 16
Ass. Int. 1117 (1961) 16
Ass. Int. 372, Pr. No. 372 (1962) 16
Sen. Int. 51, Pr. No. 51 (1962) 16

The New York Times, November 9, 1962 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

NORTHEAST AIRLINES, INC.,

Petitioner,

—against—

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of JOHN S. PEARSON, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above-named petitioner respectfully prays for issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered herein November 8, 1962, affirming en banc, with three judges dissenting, the judgment of the United States District Court for the Southern District of New York entered on November 16, 1961, after said judgment had previously been reversed and the cause remanded on July 11, 1962, by the original panel of the court that heard said appeal.

Citations to Opinions Below

The opinion of the District Court (McGohey, J.) denying defendant's motion to limit recovery to $15,000, the maximum amount permitted under the Massachusetts wrongful death statute (R. 93a-96a), also printed in Appendix A hereto, infra, p. A-1, is reported in 199 F.Supp. 539 (S.D.N.Y. 1961).

The opinion of the District Court denying defendant's motion for judgment non obstante veredicto or for a new trial (R. 163a-166a), also printed in Appendix A hereto, infra, p. A-4, is reported in 201 F.Supp. 45 (S.D.N.Y. 1961).

The opinion of the original panel of the Court of Appeals (R. 53b-85b), also printed in Appendix A hereto, infra, p. A-9, is reported in 307 F.2d 131 (2d Cir. 1962).

The opinion of the Court of Appeals upon the rehearing en banc, (R. 148b-177b), is not yet officially reported but is printed in Appendix A hereto, infra, p. A-43.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Full Faith and Credit Clause of the United States Constitution (Art. IV, sec. 1) and its implementing statute (28 U.S.C. § 1738) permit a Federal Court sitting in New York and trying a case

arising under the Wrongful Death Act of Massachusetts (Mass. General Laws, Chapter 229, Sec. 2) to refuse to enforce those provisions of the Massachusetts statute relating to the measure and limitation of damages.

2. Whether in entering a judgment against the defendant in excess of $160,000, based upon the pecuniary loss to the dependents, under the same Massachusetts statute, which provided that the defendant "... shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant," the District Court has not deprived the defendant of property without due process of law.

3.*

Constitutional Provisions and Statutes Involved

The provisions of the United States Constitution involved are:

Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial

---

* The following question, while not directly presented by this case, is also raised by the New York Court of Appeals decision in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34 (1961), upon which the decision of the Court below was based:

(3) Whether the New York rule, which permits unlimited recovery for citizens of New York suing under a foreign wrongful death statute embodying a limitation on liability, while denying that advantage to citizens of other states suing in the courts of New York, abridges the privileges and immunities of those non-citizens so discriminated against.

Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Article IV, Section 2:

"The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions involved are:

28 U.S.C. § 1738:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

* * * *

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Courts of such State, Territory or Possession from which they are taken."

Massachusetts General Laws, Ter. ed., Chapter 229, section 2:

> "Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers, except a railroad corporation or street railway or electric railroad company, by reason of his or its negligence or wilful, wanton or reckless act, or by reason of the unfitness or gross negligence or carelessness, or the wilful, wanton or reckless act, of his or its servants or agents, causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents, and recovered and distributed as provided in section one, and to the use of the persons and in the proportions, therein specified."

Statement

John S. Pearson, a resident of New York, was killed in an airplane accident involving an aircraft owned and operated by Northeast Airlines, Inc., on Nantucket Island, Massachusetts, on August 15, 1958. Mr. Pearson bought his ticket in New York.

Thereafter, his widow and administratrix, Marilyn W. Pearson, commenced this action against Northeast Airlines, Inc., in the United States District Court for the Southern District of New York to recover damages for the death.

The original complaint (R. 4a-8a) contained seven causes of action. The third, fourth, fifth and sixth causes were dismissed by Weinfeld, J., on defendant's

motion (with an opinion which is reported in 180 F.Supp. 97 (S.D.N.Y. 1960)), and they are not involved in the present proceeding. The second cause of action was dismissed on defendant's motion at the close of plaintiff's case (R. 87a-88a), and it also is not involved here. The seventh cause of action, for loss of baggage and personal property, was disposed of at the trial when the defendant's motion for a directed verdict in plaintiff's favor in the amount of $100 was granted (R. 90a).

The only cause of action involved here, therefore, is the first. In that cause of action, it was pleaded (Para. Sixteenth, R. 6a-7a):

> "That this action is commenced under and by virtue of the provisions of Chapter 229, Section 2, et seq. of the Massachusetts General Law, Ter. Ed., as they were in effect on the 15th day of August, 1958, and plaintiff claims the benefit of the above referred statute."

The Massachusetts statute, which is quoted above, provided that for the death of a passenger caused by the negligence or by the wilful, wanton or reckless act of a common carrier or its servants or agents,

> "* * * it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents."

At the close of plaintiff's case and at the close of the entire case defendant moved to dismiss all claims for damages for wrongful death in excess of $15,000 and for a directed verdict in plaintiff's favor in the sum of $15,000 (R. 89a-91a, 99a-100a). In denying

defendant's motions, to limit the damage for wrongful death to $15,000 as provided by the Massachusetts statute, Judge McGohey ruled that he was bound by the dictum of the majority of the New York Court of Appeals in the case of *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34 (1961), to the effect that the Massachusetts limitation would not be enforced by the New York courts against New York domiciliaries. Judge McGohey also ruled that the damages should be measured not by the Massachusetts standard of "* * * the degree of culpability of the defendant" but "* * * by New York's standard of the pecuniary damage resulting to the beneficiaries from the death." The judge conceded that the latter point had not been considered by the New York Court of Appeals in *Kilberg*, but stated that in the light of the *Kilberg* opinion, it was his opinion that the New York courts would so rule (R. 95a).

On November 16, 1961, the jury brought in a verdict of $133,943.77 (R. 143a) and to this amount was added the sum of $100 for loss of baggage, and $26,160.88 for prejudgment interest under New York's Decedent Estate Law from August 15, 1958, to November 16, 1961, making a total judgment of $160,204.65 (R. 145a). Judge McGohey denied defendant's motion for judgment non obstante veredicto or for a new trial, in a memorandum decision and order dated December 15, 1961 (R. 163a-166a).

On July 11, 1962, the court below, in an opinion written by the Honorable Thomas W. Swan and concurred in by the Honorable J. Edward Lumbard, Chief Judge, reversed the judgment of the District

Court and remanded the case for entry of judgment in favor of the plaintiff for $15,000 with prejudgment interest to be computed in accordance with Massachusetts law, from the date of the writ to the date of the entry of judgment rather than from the date of decedent's death to the date of the judgment (R. 53b, Appendix A infra, p. A-9). Subsequently, plaintiff-appellee filed an ex parte petition for a rehearing en banc (R. 98b) which was granted by the court below with three judges dissenting on September 13, 1962 (R. 144b). On November 8, 1962, the court handed down its decision on the rehearing en banc in which it vacated the judgment of July 11, 1962 (R. 178b) and affirmed the judgment of the District Court as reduced by the modification of the interest award, with three judges dissenting (R. 180b). Judge Kaufman wrote the majority opinion which was concurred in by Judges Clark, Waterman, Smith, Hays, and Marshall. Judge Friendly wrote the dissenting opinion in which Chief Judge Lumbard and Judge Moore joined (R. 148a, Appendix A infra, p. A-43).

Reasons for Granting the Writ

The opinion of the Court of Appeals for the Second Circuit en banc has decided questions of constitutional law involving the Full Faith and Credit and Due Process Clauses of the Constitution which have never been ruled upon by this Court, and to which the answers (before the decisions in this case and in the case of *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34 (1961)) had apparently been assumed by both bench and bar to be directly contrary to the decision of the

Court of Appeals. The questions are of vital importance to the proper administration of justice in all cases in which the courts of one state are called upon to apply the statutes of another state. And, finally, they are of importance not only to the courts, but also to the legislatures of the several states.

The Court of Appeals has decided in this case, over the dissents of Chief Judge Lumbard and Circuit Judges Swan, Friendly, and Moore, that neither the Full Faith and Credit Clause nor the Due Process Clause of the United States Constitution prevents a state court (or a federal court sitting in the state in a diversity action), when applying a wrongful death statute of a sister state, from refusing to enforce certain integral provisions of the applicable statute which are distasteful to the policy of the forum state.

In so deciding, the Court of Appeals followed the dictum of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc.*, *supra* (printed in Appendix B infra, p. B-1), which had been declared unconstitutional by the original panel (Appendix A infra, p. A-9). It is important to note that no question is here involved of the constitutionality of applying the New York Wrongful Death Statute, since the New York court held in *Kilberg* that the statute had no extraterritorial effect (Appendix B infra, p. B-2, 3, 5).

It is also important to note that the refusal of the New York courts to apply the Massachusetts damage limitation was not based on any theory that the limitation is "procedural" rather than substantive. In *Davenport* v. *Webb*, 11 N.Y. 2d 392 (1962), (printed

in Appendix B infra, p. B-21), the New York Court of Appeals, clarifying certain language in *Kilberg*, made it clear that the decision in that case was based entirely on policy grounds.

The question presented is a novel one, involving issues of Constitutional law which have never been passed upon by this Court, and to which (until now) the answer had been assumed to be directly contrary to the answer given by the court below.

In the four separate opinions written in the Court of Appeals, not one case has been cited in which this Court, or any other court, has sanctioned such a segmentation of a statute of a sister state under the Full Faith and Credit Clause. A reading of the cases which touch upon the subject indicates quite clearly that, until now, it had been assumed without question that if a state court applies a foreign statute it must apply the provisions of that statute relating to measure and limitation of damages.[1] Even in the *Kilberg* case, which was the genesis of the new rule in New York, no argument was made by any party that New York could ignore the limitation of the Massachusetts statute: the rule was suggested by the New York Court of Appeals *sua sponte* in an action de-

[1] See for example, *Richards* v. *United States*, 285 F.2d 525 (10th Cir.1960), aff'd 369 U.S. 1 (1962); *Stoltz* v. *Burlington*, 178 F.2d 514 (10th Cir.1949); *Maynard* v. *Eastern Air Lines, Inc.*, 178 F.2d 139 (2d Cir. 1949); *Curtis* v. *Campbell*, 76 F.2d 84 (3rd Cir. 1935); *Barnes* v. *Union Pac. Ry. Co.*, 139 F.Supp. 198 (D.Utah 1956); *Tillinghast* v. *Maggs*, 82 R.I. 478, 111 A 2d 713 (1955); *Caldwell* v. *Abernathy*, 231 N.C. 692, 58 S.E.2d 763 (1950); *Bagley* v. *Small*, 92 N.H. 107, 26 A 2d 23 (1942); *Wellman* v. *Mead*, 93 Vt.322, 107 A.396 (1919).

scribed by one of the judges as without "warrant or justification" (Appendix B infra, B-8). Two other judges of the same court expressed

> ". . . grave doubts as to the constitutionality of the majority view in light of the decision of the Supreme Court of the United States in *Hughes* v. *Fetter* (341 U.S. 609) and section 1738 of title 28 of the United States Code, the implementing statute under the full faith and credit clause of the United States Constitution (art. IV, § 1), which provides that full faith and credit be accorded to the acts of the Legislature of any State." (Appendix B infra, B-20)

That the law, prior to the *Kilberg* decision, had been assumed to be different, is indicated by this Court's decision in *Richards* v. *United States*, 369 U.S. 1 (1962). In that case, which was tried in the Oklahoma District Court and which involved an airplane accident in Missouri, the principal point at issue was whether the Federal Tort Claims Act required the application of the wrongful death act of Missouri (where the death occurred) or of Oklahoma (where the negligence occurred, and where the case was tried). This Court held that the Federal Tort Claims Act required the application of the Missouri Act, via the Oklahoma conflict of laws rule, just as in this case the New York conflict of laws rule required the application of the Massachusetts Act. But in *Richards* the Missouri $15,000 limitation was held applicable without discussion, even though this Court was at pains to point out (369 U.S. at 15) that Oklahoma could constitutionally have applied its own Act, which had no limitation.

The parallel between the *Richards* case and this case is singularly exact, because, as Judge Swan pointed out (infra, p. A-19), Oklahoma has precisely the same constitutional prohibition against death damage limitations as does New York, and therefore the same "strong public policy" which was relied upon in *Kilberg* to justify the refusal of New York to enforce the Massachusetts limitation.

Therefore, although it may well be true that the point was not argued before this Court in *Richards*, the fact remains that in an exactly similar situation this Court has reached a conclusion opposite to that reached here.

It may be said that there was no showing in *Richards* that Oklahoma has implemented its policy, as New York has in *Kilberg*, by refusing to enforce foreign limitations. The point was not raised in the opinion, so we cannot know. But that only begs the question. If Oklahoma had adopted the "*Kilberg* rule", would this Court have come to a different conclusion in *Richards*? Nothing in the *Richards* opinion gives any clue to the answer.

Clearly the question is an unsettled one, which, in view of the result reached by this Court in *Richards*, should be considered and decided by this Court.

The question presented is an important one which has been or will be presented in every case where one state is required to apply the laws of another state.

There can be no doubt that the question is an important one. The *Kilberg* opinion, and the opinions below in this case, all emphasize the tremendous growth of the air transportation industry and the accompanying increase in litigation involving the legitimate interests of several states, such as the state of residence of the passengers, the state of incorporation of the airline, the states of departure and destination, and the state of the accident. It is not unusual—in fact, it may be said to be the normal occurrence—for many or all of the statutes of these states to be different. Thus, in many, or a majority of, cases involving airplane accidents the forum will be called upon to apply the laws of sister states. How those laws should be applied, and the extent of the freedom of the forum state (if any such freedom exists under the Full Faith and Credit Clause) to pick and choose the elements of those laws which it will or will not enforce, are questions which must be decided if the administration of justice in this area is not to become chaotic. There are, in fact, cases now pending in other jurisdictions in which the courts will shortly be called upon to decide this very question. It was raised, peripherally, in *Popkin* v. *Eastern Air Lines, Inc.*, 204 F.Supp. 426 (E.D. Pa. 1962), where, in fifty-five cases arising out of an airplane crash in Massachusetts, it was argued in opposition to a motion for change of venue that the change would deprive the plaintiffs of substantial rights since Penn-

sylvania would follow the *Kilberg* rule and refuse to enforce the Massachusetts limitation. No decision was made on that particular point; the Court noted the pendency of the appeal in this case, and refused to make ". . . a premature decision on the Constitutional issue of the application of the full faith and credit clause." 204 F.Supp. at 435. The cases were ordered to be transferred, but, in an opinion filed on November 19, 1962, the Court of Appeals for the Third Circuit on plaintiffs' petition for a writ of prohibition, in effect reversed this decision. If the cases remain in Pennsylvania, the constitutionality of the *Kilberg* rule will be squarely presented to the Pennsylvania federal courts.

The question has also arisen, but was not decided, in the Sixth Circuit. See *Goranson* v. *Kloeb*, 308 F.2d 655 (6th Cir. 1962).

Even on the single question of death damage limitations, the problem is of vast importance. One quarter of the states[2] now have such limitations, and presumably imposed such limitations for reasons of policy which were compelling to the legislatures involved. As Judge Friendly in the dissent below points out, such states "should not be obliged to speculate that other states may take what is liked and reject what is disliked" (infra, p. A-67). The decision below, however, if upheld, will require such speculation, and its effects, therefore, will be felt not only by the courts and by the litigants, but also by the legislatures of all of the states.

---

[2] Colorado, Illinois, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, Oregon, South Dakota, Virginia, West Virginia, and Wisconsin—thirteen states in all.

The importance of the decision below is underlined by the attention the so-called "*Kilberg* rule" has received in legal periodicals. The majority opinion (Appendix A infra, p. A-47) cites no less than nineteen different law reviews which have discussed or commented on the *Kilberg* decision. The decision of the court below in this case is too recent to have, as yet, attracted such a volume of comment; but it is of interest to note, for example, that the decision was considered of sufficient significance to warrant a front-page article in The New York Times of November 9, 1962.

The decision below has resolved conflicts between the policies of two states, and between the policy of the United States Constitution and the local policy of New York, in a manner which cannot be supported.

The issue here, in essence, is whether one state, when it is called upon to enforce the statute of a sister state, may pick and choose among the various provisions of that statute and "take what is liked and reject what is disliked." The majority has held that the Full Faith and Credit Clause, and its implementing statute, 28 U.S.C. § 1738, do not prevent such picking and choosing. This result, as the dissenters point out, cannot be reconciled with the purpose of the Full Faith and Credit Clause, or with the plain language of the statute, which requires that

> "Such Acts . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the

courts of such State, Territory or Possession from which they are taken."

Two strong conflicts of policy were presented to the court below. The first, the conflict between the policy of New York against enforcing foreign death damage limitations and that of Massachusetts in favor of such limitations, was resolved in favor of New York's policy. The second and more important was the conflict between New York's policy and what this Court has called ". . . the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations and rights created and recognized by the statutes of sister states." *Hughes* v. *Fetter,* 341 U.S. 609 (1951) at 612. This conflict, also, was resolved by the court below in favor of the New York policy.

It is submitted that the resolution of these two conflicts offered by the Court of Appeals was clearly wrong. Granted that New York's policy against death damage limitation is "strong, clear and old," (infra, p. B-4) the implementation of that policy by refusing to enforce foreign limitations is new—as new as the *Kilberg* case. Moreover, the New York State legislature, despite the "strong, clear and old" policy, has three times rejected proposed bills which would require an air carrier doing business in New York to consent to the application of the New York statute in all cases involving passenger deaths outside the state.[3]

[3] State of New York—An act to amend the Decedent Estate Law, in relation to the applicable law in a wrongful death action predicated upon an airplane accident outside the state." Ass.Int.3512, Pr.No.4734 (1960); Ass.Int.1117 (1961); Ass.Int.372, Pr.No.372 (1962); Sen.Int.51, Pr.No.51 (1962).

The Massachusetts policy in favor of the culpability standard and the limitation of damages, on the other hand, is not only very "strong, clear and old", but it has been reaffirmed by the legislature three times since 1958.

In that year the statute was amended, effective in 1959, to increase the limitation to $20,000, but the culpability standard and the principle of limitation were retained. Ann. Laws Mass. c. 229, § 2 (Cum. Supp. 1961), Mass. Acts 1958, c. 238, § 1. In 1961 the Massachusetts legislature provided for ". . . . an investigation by the judicial council relative to removing both maximum and minimum limitations of recovery in tort actions for death." Mass. Acts and Resolves, 1961, c. 30. The judicial council returned an adverse report on the bill to eliminate the limitation. Mass. Judicial Council, 37th Report, 45-47 (1961) ("accepted" June 21, 1962). In 1962 the statute was again amended to raise both minimum and maximum limitations, effective January 1, 1963. Mass. Acts 1962, c. 306. The committee which recommended the new bill to the legislature reported that it had specifically considered and rejected two alternate bills (H. No. 274, H. No. 2964) which would have abolished the maximum limitation altogether. See Legislative Record at 583 in "Commonwealth of Massachusetts, General Court of 1962, Bulletin of Committee Work and Business of the Legislature" (Final Ed., 1962 Sess.).

Thus, there can be no comparison between the relative strengths of the two state policies; and if the only conflict were between those two policies, it would ap-

pear that the Massachusetts policy should prevail. There can be no contention that Massachusetts has no "contacts" sufficient to justify the application of its policy: not only did the accident occur in that state, but the defendant is a Massachusetts corporation, and —all question of "vested rights" aside—it is as much entitled to the protection of the laws of its domicile as the plaintiff is entitled to the protection of the laws of hers.

But that is not the only, nor the most important conflict. The overriding consideration here is whether the New York policy should prevail over the "strong unifying principle" of the Full Faith and Credit Clause. The majority below has held that it should, and that New York can refuse to enforce those portions of the Massachusetts statute which are not in accord with its local policy. The majority opinion professed to find no conflict between that holding and the plain language of the Full Faith and Credit Clause, and it does not even refer to the language of 28 U.S.C. § 1738, quoted above. Petitioner submits that there is a clear conflict, and that what the majority opinion below has in fact done is to drain all meaning from the clause and from the statute.

Whether the problem is put in terms of a conflict between the policy of the United States and the policy of New York, or in terms simply of the meaning of the Full Faith and Credit Clause as applied to statutes, clearly it is one which merits review by this Court.[4]

---

[4] The *Kilberg* dictum also raises grave questions under the Privileges and Immunities Clause of the Constitution (Art. IV, Sec. 2). The several references to protecting "the traveling citizen of this State" (infra, p. B-3), "our own States people" (infra, p. B-4),

The question presented here is one fundamental to the philosophy of the Full Faith and Credit Clause, and fundamental to the nature of the relationship of the various states and the federal government. It is a question which has never been squarely presented to this Court, in all probability because, until now, the answer was assumed to be contrary to what the court below has now decided. It is a question of tremendous importance, particularly to a type of litigation which is increasing yearly in volume and significance. It is a question of importance not only to the courts and to the litigants before them, but also to the legislatures of the several states.

It is, in short, a question which should and indeed must be finally decided by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM J. JUNKERMAN
Counsel for Petitioner

DOUGLAS B. BOWRING
JAMES L. McQUILLAN
Of Counsel

---

and to disregarding a ceiling on damages "at least to our own domiciliaries" (infra, p. B-5), clearly indicate that the advantages of the new rule are to be denied to non-citizens, a seemingly arbitrary discrimination. Before commencement of this trial, Judge McGohey ruled that the Massachusetts limitation of $15,000 would be applied in the consolidated case of *Trauth* v. *Northeast Airlines, Inc.*, involving a New Jersey domiciliary. (R. 14a-17a, 20a-21a).

District Court Opinion Denying Limitation and Directed Verdict for Plaintiff

[199 F. Supp. 539]

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of John S. Pearson, deceased and Marilyn W. Pearson,

Plaintiff,

v.

NORTHEAST AIRLINES, INC.,

Defendant.

United States District Court
S. D. New York
Nov. 14, 1961.

Frank G. Sterritte, Speiser, Quinn & O'Brien, New York City, for plaintiff; F. M. DeRosa, William F. X. Geoghan, Jr., and Howard G. Law, Jr., New York City, of counsel.

Haight, Gardner, Poor & Havens, New York City, for defendant; William J. Junkerman, L. Anthony Zega, New York City, of counsel.

McGOHEY, District Judge.

The plaintiff sues for damages for her husband's death in the crash of the defendant's airplane on which he was a passenger, at Nantucket, Massachusetts on August 15, 1958. The legal basis for her claim is the Massachusetts Wrongful Death Statute.[1] That statute limits the amount

[1] Mass.Gen.Laws Ann. ch. 229, § 2 (1958). The statute has since been amended to raise the upper limit of recovery to $20,000. Mass. Gen.Laws Ann. ch. 229, § 2 (Supp. 1961).

recoverable in such a case to a "sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents * * *." Despite this, the plaintiff asks damages of $600,000 for the allegedly wrongful death of her husband.

The plaintiff is now and at the time of her husband's death he and she were citizens and domiciliaries of New York. The defendant is a Massachusetts corporation. This court's jurisdiction rests on the diverse citizenship of the parties.

Two questions have arisen: first, is the amount recoverable by this plaintiff limited to $15,000? second, if it is not, is the amount recoverable to be measured by "the degree of culpability of the defendant" as provided in the Massachusetts statute, or by the degree of "pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought," as provided by the law of New York?[2]

In this diversity case, this court sits as another state court of New York[3] and must apply New York's conflicts law as announced by its highest court.[4]

In *Kilberg* v. *Northeast Airlines*,[5] a case arising out of the same crash involved here, the New York Court of Appeals in a considered dictum expressed by the Chief

---

[2] New York Decedent Estate Law, §132.

[3] Guaranty Trust Co. of N. Y. v. York, 326 U.S. 99, 108, 65 S.Ct. 1464, 89 L.Ed. 2079.

[4] Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 6 S.Ct. 1020, 85 L.Ed. 1477.

[5] 9 N.Y.2d 34, 211 N.Y.S.2d 133, 136, 172 N.E.2d 526, 529.

District Court Opinion Denying Limitation and Directed Verdict for Plaintiff

Judge and concurred in by three Associate Judges said: "For our courts to be limited by [Massachusetts'] damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to [enforce it]." It was further said that if Kilberg's claim which, like this, was filed under the Massachusetts statute, were amended to seek more than $15,000 it could "be enforced, if the proof so justifies, without regard to the $15,000 limit." That dictum, so far as appears, has not been repudiated or modified. I believe, therefore, that it states the law which, if this suit were pending in a New York court, that court would apply. Accordingly, since I believe I am required to apply it here, I hold that the amount recoverable by this plaintiff is not limited to $15,000.

The New York Court of Appeals in Kilberg did not consider the second question which has arisen here. Accordingly, this court must determine how that court, if it had considered that question, would have answered it. For the reasons that follow, I think it would have answered by saying that the damages should be measured by New York's standard of the pecuniary damages resulting to the beneficiaries from the death.

Chief Judge Desmond pointed out that since 1894 New York's Constitution, article 1 section 18, has forbidden not only abrogation of the then existing statutory right of action for damages for injuries resulting in death, but also "any statutory limitations" on the "amount recoverable" in such actions. The Chief Judge quoted with approval the observation of Mr. Justice Hatch in *Medinger* v. *Brooklyn Heights R. R. Co.*,[6] that "The ar-

[6] 6 A.D. 42, 39 N.Y.S. 613, 616 [1896].

gument which evidently controlled the convention [of 1894] in its action consisted of the claim that the arbitrary limitation [of damages] was absurd and unjust, in measuring the pecuniary values of all lives to the next of kin by the same arbitrary standard." This is precisely what results from application of Massachusetts' standard of measuring damages, viz. the degree of the defendant's culpability. "Pecuniary values" indeed then become altogether immaterial regardless of how great they may be in any given case. It seems to me that having rejected, as to New York domiciliaries, Massachusetts' "damage ceiling" of $15,000, New York would also reject the Massachusetts rule for measuring damages by factors unrelated to the pecuniary loss sustained by beneficiaries. Accordingly, I hold that the damages, if any, recoverable by the plaintiff are to be measured by the degree of the plaintiff's pecuniary injury.

So ordered.

District Court Opinion Denying Motion for Judgment *N.O.V.* or for New Trial

[201 F. Supp. 45]

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of John S. Pearson, deceased, and Marilyn W. Pearson, Plaintiff,

v.

NORTHEAST AIRLINES, INC.,
Defendant.

United States District Court

S. D. New York.

Dec. 15, 1961.

Frank G. Sterritte, New York City, for plaintiff.

Haight, Gardner, Poor & Havens, New York City, William J. Junkerman, New York City, of counsel, for defendant.

McGOHEY, District Judge.

This diversity suit, brought pursuant to the Wrongful Death Statute of Massachusetts,[1] was tried to a jury which on November 16, 1961, rendered a verdict in the sum of $133,943.77 in favor of the plaintiff on her claim for damages for her husband's death. Judgment was thereafter entered for that amount plus $26,106.88, prejudgment interest from August 15, 1958, the date of death.

---

[1] Mass.Gen.Laws ch. 229 § 2.

District Court Opinion Denying Motion for Judgment N.O.V. or for New Trial

The defendant has moved "(1) for an order setting aside the verdict of the jury in the above-entitled action and providing for the entry of judgment in favor of the plaintiff in the sum of $15,000 in accordance with defendant's motion for a directed verdict at the close of the plaintiff's case and at the close of all of the testimony upon the ground that on the facts and the law in this case, the sum of $15,000 is the maximum to which plaintiff is entitled; and in the alternative (2) for an order granting a new trial upon the ground that the verdict is contrary to law, contrary to the evidence, and is excessive; (3) for an order striking out the interest on the verdict added by the clerk of the court covering the period from August 15, 1958, to November 16, 1961; and (4) for such other and further relief as to the court may seem just and proper."

The motion is in all respects denied.

During the trial, this court, following the dictum of the New York Court of Appeals in Kilberg v. Northeast Airlines, Inc.,[2] ruled (a) that the plaintiff was not limited to a maximum recovery of $15,000 as prescribed in the Massachusetts statute; and (b) that damages were not to be measured by "the degree of culpability of the defendant," as prescribed in that statute, but by the plaintiff's pecuniary loss resulting from her husband's death, as prescribed in New York's Decedent Estate Law, McKinney's Consol. Laws, c. 13, § 132. This court's reasons for these rulings are set forth in its opinion filed on November 14, 1961.[3]

---

[2] 9 N.Y.2d 34, 211 N.Y.S. 2d 133, 172 N.E.2d 526.

[3] 199 F.Supp. 539.

District Court Opinion Denying Motion for Judgment N.O.V. or for New Trial

In Kilberg, the New York Court of Appeals did not, it is true, discuss the questions of pre-judgment interest. However, in light of what that court did say in that case, it seems altogether likely that, if that question had been considered, the New York Court would have ruled that, in accordance with new York's policy as expressed in section 132 of the Decedent Estate Law, pre-judgment interest on the amount of any verdict in Kilberg's favor would have to be included in the judgment entered thereon. Accordingly, in the instant case the clerk was directed by this court to include in the judgment pre-judgment interest on the amount of the verdict.

The defendant relies on three cases in support of its contention that this court's direction to add pre-judgment interest was unauthorized: Wyman v. Pan American Airways,[4] Maynard v. Eastern Air Lines,[5] and St. Clair v. Eastern Air Lines.[6] The first two of these cases are inapplicable here. They were decided respectively in 1943 and 1949, long before the decision in Kilberg. The third case cited was a wrongful death action brought pursuant to the District of Columbia Wrongful Death Act,[7] which does not provide for the award of pre-judgment interest. The plaintiff there, relying on the Kilberg dictum, moved, after entry of judgment, for amendment thereof to add pre-judgment interest in accordance with section 132 of

[4] 181 Misc. 963, 43 N.Y.S. 2d 420, aff'd (no opinion) 267 App. Div. 947, 48 N.Y.S. 2d 459, aff'd (no opinion) 293 N.Y. 878, 59 N.E. 2d 785; cert. denied 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432.

[5] 2 Cir., 178 F. 2d 139, 13 A.L.R. 2d 646.

[6] D.C.S.D.N.Y., 194 F. Supp. 623.

[7] D.C.Code §§ 16-1201 to 16-1203.

New York's Decedent Estate Law. The judge who heard the motion denied it. In a short opinion, after noting that in Kilberg the Court of Appeals did not refer to or consider the question of pre-judgment interest, he held the Kilberg dictum "has no bearing" on the issue raised by the motion before him. [194 F.Supp. 624.]

The District of Columbia statue, unlike the Massachusetts statute, does not set a ceiling on the amount of damages which may be recovered for wrongful death. Neither does it provide that damages are to be measured by "the degree of culpability of the defendant." On the contrary, the damage provisions of the District of Columbia statute are substantially the same as New York's except that the former do not require the award of pre-judgment interest on the jury's verdict. Whether, because of this, New York's highest court would consider the damage provisions of the District of Columbia statute so contrary to New York's policy as to justify New York's courts in refusing to enforce them, need not be decided here. It is sufficient to note the significant differences between the statutes of the District of Columbia and Massachusetts. In view of that difference, the decision in St. Clair v. Eastern Air Lines, supra, does not seem to me to require denial of pre-judgment interest here.

So ordered.

Opinion of Original Panel of Court of Appeals

[307 F. 2d 131]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 297—September Term, 1961.

(Argued April 11, 1962 Decided July 11, 1962.)

Docket No. 27350

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels, and Credits of JOHN S. PEARSON, deceased,
Plaintiff-Appellee,

—v—

NORTHEAST AIRLINES, INC.,
Defendant-Appellant.

Before: LUMBARD, *Chief Judge*, and SWAN and KAUFMAN, *Circuit Judges*.

This is an appeal by the defendant, Northeast Airlines, Inc., a Massachusetts corporation, from a judgment of $160,204.65 for plaintiff, administratrix of the estate of her deceased husband, who was killed when defendant's plane, on which he was a passenger, crashed on Nantucket Island, Massachusetts. The case was tried before Judge McGohey and a jury, which was instructed that the $15,000 limitation of the Massachusetts wrongful death act was inapplicable. Judgment reversed and cause remanded.

HAIGHT, GARDNER, POOR & HAVENS, New York N. Y., *for Appellant*. William J. Junkerman and Douglas B. Bowring, Of Counsel.

APPENDIX A

COPIES OF OPINIONS BELOW

FRANK G. STERRITTE, New York, N. Y., *for Appellee*. Florindo M. De Rosa, William L. Shumate and Stuart M. Speiser, Of Counsel.

SWAN, *Circuit Judge*:

This appeal involves litigation which resulted from the crash, on August 15, 1958, of appellant's airplane on Nantucket Island. Mrs. Pearson as administratrix of her deceased husband's estate brought suit in the Southern District of New York, federal jurisdiction resting on diversity of citizenship, she being a citizen of New York and defendant a Massachusetts corporation. Her complaint alleged seven causes of action,[1] but there remains for consideration on the appeal only the cause of action based on the Massachusetts wrongful death act, which limits recovery to $15,000, and certain orders of the trial court denying defendant's motions (a) to dismiss the complaint insofar as it sought damages for wrongful death in excess of $15,000, (b) for a directed verdict for plaintiff in the amount of $15,000, (c) for judgment *non obstante veredicto* in the limited amount of $15,000, and (d) for an order striking out that portion of the judgment which awarded plaintiff interest from the date of death, August 15, 1958, to the date of judgment, November 16, 1961, amounting to $26,106.88.

In denying defendant's motions to limit recovery to the maximum permitted under the Massachusetts wrongful

[1] Four of the original causes of action were dismissed by Judge Weinfeld in a memorandum decision published at 180 F. Supp. 97. Another based on decedent's pain and suffering prior to death, was dismissed at the close of the trial for lack of proof. The seventh count was for loss of personal property of the decedent. As to this, the court, on defendant's motion, directed a verdict for $100, and plaintiff has not appealed.

Mrs. Pearson also filed a libel in admiralty which was dismissed for lack of jurisdiction at 199 F. Supp. 538.

death act,[2] Judge McGohey ruled that he was obliged to apply a dictum of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34 to the effect that the Massachusetts limitation would not be enforced against a New York citizen suing in a New York court.[3]

---

[2] Chapter 229, section 2, Massachusetts General Laws:

"§2. Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers * * * causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents, and recovered and distributed as provided in section one, and to the use of the persons and in the proportions, therein specified."

[3] Jack Kilberg sued as administrator of the estate of Edward J. Kilberg, a passenger on the plane who was killed in the same crash as Mrs. Pearson's husband. The opinion states:

* * * *

"Four our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law * * *"

* * * *

"We will still require plaintiff to sue on the Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damages."

* * * *

"As to whether the measure of damages should be treated as a procedural or a substantive matter in wrongful death cases, there is authority both ways * * * It is open to us, therefore, particularly in view of our own strong public policy as to death action damages, to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies."

* * * *

"From all of this it follows that while plaintiff's second or contract cause of action is demurrable, his first count declaring under the Massachusetts wrongful death action is not only sustainable but can be enforced, if the proof so justifies, without regard to the $15,000 limit."

Northeast's brief in this court states that Mrs. Kilberg did not amend her complaint but accepted less than $15,000 in settlement, and discontinued her action.

He also ruled that the damages should be measured not by "the degree of culpability of the defendant," as required by the Massachusetts statute, but "by New York's standard of the pecuniary damage resulting to the beneficiaries from the death." Judge McGohey's opinion is reported at 199 F. Supp. 539. Later, in denying defendant's motion to strike pre-judgment interest, he wrote a memorandum decision and order, dated December 15, 1961, not reported in Federal Supplement.

From these rulings of the trial court the defendant has appealed. It is not contended that in refusing to enforce the Massachusetts limitation of $15,000 Judge McGohey misconstrued the *Kilberg* dictum. It is contended that such ruling violates the full faith and credit clause and the due process clause of the United States Constitution. With respect to the rulings on the measure of damages and on pre-judgment interest appellant contends that the trial court did misconstrue the New York law, or, if he correctly construed it, that the New York law is similarly unconstitutional. For reversal of the ruling as to pre-judgment interest reliance is also placed on a decision of the Appellate Division, First Department, made subsequent to Judge McGohey's decision of December 15, 1961[3a]

Appellant devotes some ten pages of its brief to criticism of the *Kilberg* dictum in the endeavor to show that it "represents not only an ill-advised excursion into the field of advisory opinions, but a misconception (at least) of the earlier New York law and bad law in itself," and notes that three judges of the Court of Appeals stated in vigorous terms that the majority had no "warrant or

---

3a *Davenport* v. *Webb*, 15 App. Div. 42. This decision was affirmed on June 12, 1962, 11 N. Y. 2d ——.

justification" for going beyond the issue decided. We think it inappropriate for this court to discuss the wisdom or the soundness of the majority's dictum, and there is no necessity of our doing so. Consequently we pass at once to a discussion of the appeal.

Since federal jurisdiction rests on diversity, it is clear that Judge McGohey was obliged to apply the law of the State of New York, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, including its conflict of laws, doctrine, *Klaxton* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, unless some provision of the Constitution of the United States precludes its application. On the main issue, limitation of liability, appellant contends that application of the dictum violates the full faith and credit clause, while appellee contends that this provision does not preclude a State from applying its own conflict of laws rule.

A majority of the court holds, Judge Kaufman dissenting, that the trial court's refusal to apply the $15,000 limitation of the Massachusetts statute violates the Full Faith and Credit Clause of the Constitution. (Art. IV, section 1.)[4] In denying the motion to strike out pre-judgment interest, we are all agreed that the trial court erred.

The purpose of the full faith and credit clause of the Constitution, as briefly explained in *Sherrer* v. *Sherrer*, 334 U. S. 343, 355, was to transform an aggregate of independent sovereign states into a nation. "If in its application local policy must at times be required to give way, 'such is part of the price of our federal system' * * *"

[4] "Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." (See also the implementing statute, 28 U. S. C. A. §1738.)

[citation omitted]. To like effect is *Estin* v. *Estin*, 334 U. S. 541, 545-546. Neither of these cases was an action for wrongful death. The conflict between a foreign wrongful death action and a statute of the forum has been considered by the Supreme Court in three cases: *Hughes* v. *Fetter*, 341 U. S. 609; *First National Bank* v. *United Air Lines*, 342 U. S. 396; *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514. Appellant relies upon the first two; appellee upon the last.

In *Hughes* the highest court of Wisconsin affirmed the dismissal of an action brought under the wrongful death statute of Illinois on the ground that a Wisconsin statute had been construed by its courts as establishing a local public policy against entertaining suits brought under wrongful death statutes of other States. This was reversed by the Supreme Court as a violation of the full faith and credit clause, Mr. Justice Black, who wrote the majority opinion, stating at pages 611-612:

> " * * * We have recognized, however, that full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state; rather it is for this Court to choose in each case between the competing public policies involved. The clash of interests in cases of this type has usually been described as a conflict between the public policies of two or more states. The more basic conflict involved in the present appeal, however, is as follows: On the one hand is the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations [or rights] created or recognized by the

statutes of sister states; on the other hand is the policy of Wisconsin, as interpreted by its highest court, against permitting Wisconsin courts to entertain this wrongful death action.

We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against wrongful death suits in general. * * *"

As in *Hughes*, the present appeal involves the same "more basic conflict"—a conflict between "the strong unifying principle embodied in the Full Faith and Credit Clause" and the public policy of New York expressed in the *Kilberg* dictum. It is likewise true that New York has no antagonism to wrongful death actions in general. Its antagonism is only to the limitation of liability. Its own statute has no limitation but the opinion recognizes that plaintiff's rights arise under the Massachusetts statute, not the New York statute.[3] The Supreme Court is the final authority to choose "between the competing public policies involved." But on the present appeal this court must make the choice. This court believes that the "strong, unifying principle" of the full faith and credit clause should prevail.

In the *First National Bank* case the suit was brought in a federal district court in Illinois, on gorunds of diversity of citizenship, to recover under the Utah wrongful death statute for a death which occurred in Utah. As required by an Illinois statute, the trial court dismissed the suit, and the Court of Appeals affirmed, 190 F. 2d 493. But he Supreme Court held the statute invalid under

[3] See note 3, *supra*; also the Court of Appeals discussion of *Kilberg* in *Davenport* v. *Webb*, 11 N. Y. 2d ——.

the full faith and credit clause of the Constitution. In a concurring opinion Mr. Justice Jackson wrote at page 400:

> "For the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred. [Citations omitted.]
>
> There is undoubtedly some area of freedom for state conflicts law outside the requirements of the Full Faith and Credit Clause. In such matters, unreached by constitutional law, the state rule would prevail in a diversity court *Klaxon Co.* v. *Stentor Co.*, 313 U.S. 487. But if a transaction is so associated with one jurisdiction that the Constitution compels any forum in which the transaction is litigated to apply the law of that jurisdiction, is it not the Constitution instead of state conflicts law which determines what law the federal court shall apply?"

That the answer to this question should be "yes" is the belief of a majority of this court.

In *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, plaintiff's decedent was killed in Alabama by a bursting emery wheel alleged to have been defective. The Alabama wrongful death act contained a "built in" two-year statute of limitations. Within two years, but more than one year, after decedent's death, plaintiff sued the manufacturer of the emery wheel in a federal court in Pennsylvania, jurisdiction resting on diverse citizenship. The Pennsylvania statute of limitations was one year, and the issue was whether the court was compelled to give full faith and credit to the two-year limitation of Alabama. The Supreme Court held it was not. Mr. Chief Justice Vin-

son's opinion distinguished *Hughes* and *First National Bank* on the ground that in those cases "the forum laid an uneven hand on causes of action arising within and without the forum state" whereas "Here Pennsylvania applies her one-year limitation to all wrongful death actions wherever they may arise." The opinion explains that the court "long ago" had held that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit, and states that that clause "does not compel a state to adopt any particular set of rules of conflict of laws; it merely sets certain minimum requirements which each state must observe when asked to apply the law of a sister state."[6]

The appellant argues that the "minimum requirements" which New York must observe demand enforcement of the Massachusetts limitation, because, as stated by Mr. Justice Holmes in *Slater* v. *Mexican National R. Co.*, 194 U. S. 120, 126: "It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny to the defendant the benefit of whatever limitations on his liability that law would impose." In *Davis* v. *Mills*, 194 U. S. 451 at 454, the same Justice said: "* * * But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates."

Appellant argues further that there is an obvious distinction between the *Wells* case and the case at bar. In *Wells* the plaintiff was not deprived of all remedy; he could sue in any state where defendant could be found and which has a longer statute of limitations than Pennsylva-

[6] Cf. dissenting opinion of Mr. Justice Jackson in which Mr. Justice Black and Mr. Justice Minton joined. 345 U. S. 519.

nia or follows a different conflicts rule. In our case defendant had no choice as to the forum. If deprived of the protection of the limitation imposed by the law which, as *Kilberg* recognizes, created the liability, he will be treated unjustly.

A defendant is in a different position from a plaintiff who seeks to enforce a cause of action conferred by the laws of another state, as Mr. Justice Brandeis pointed out in *Bradford Electric Light Co.* v. *Clapper*, 286 U. S. 145, 160:

> "* * * A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done." [Citations omitted.]

The *Clapper* case involved the workmen's compensation laws of Vermont and New Hampshire. Appellant concedes that the decision has been diluted by subsequent cases dealing with workmen's compensation but argues persuasively that nothing in the later cases gives support to the proposition that full faith and credit must give way to a local policy not embodied in a statute which directly governs the cause of action.[7] As previously noted, *Kilberg*

[7] For example, in *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U. S. 532, at 541, it was pointed out that "while similar power to control the legal consequences of a tortious act committed elsewhere has been denied, * * * the liability under workmen's compensation acts is not for a tort * * * *.*" See also *Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493, 499; *Carroll* v. *Lanza*, 349 U. S. 408, 413-414.

"still requires plaintiff to sue on the Massachusetts statute"; it does not claim extra-territorial effect for the New York wrongful death act. In our opinion the workmen's compensation decisions are distinguishable from the case at bar.

So also are decisions involving the federal Tort Claims Act. *Richards* v. *United States*, 369 U. S. 1, cited by appellee as favorable to it, is favorable to appellant, if it has any relevance. No constitutional question was there presented; Missouri was the place of the death, and Oklahoma the place of the negligence. Missouri, like Massachusetts, had a $15,000 limitation on wrongful death damages, and Oklahoma, like New York, had a constitutional limitation against such limitation. The final result of the litigation was to apply the Missouri statute, where the death occurred. See *Richards* v. *United States*, 10 Cir., 285 F. 2d 521, which the Supreme Court affirmed.

There is no decision by the Supreme Court that the failure to enforce the limitation of a foreign wrongful death act is consistent with the full faith and credit clause of the Constitution. A majority of this court holds it is not. Consequently it is unnecessary to consider appellant's other contentions, except the ruling as to pre-judgment interest.

The *Kilberg* dictum did not mention the subject of interest. Judge McGohey directed that pre-judgment interest be added because he thought it likely that if the question had been considered, the New York court would have ruled in accordance with the policy expressed in section 132 of the Decedent Estate Law. A few days subsequent to denial of the motion to strike out such interest, *Davenport* v. *Webb*, 15 App. Div. 42 was de-

cided.[8] This decision was affirmed by the Court of Appeals in 11 N. Y. 2d ——. It will suffice to quote from that opinion the following:

> "In New York, the prejudgment interest in a wrongful death action is 'part of the damages' (*Glebhorn* v. *The Ocean Accident & Guarantee Corp. Ltd.*, 244 N. Y. 166, 167), the addition of which is governed by recourse to the usual conflicts of law rules, which we have consistently applied by not adding interest to the judgment unless *lex loci delictus* authorizes such an addition." [Citations omitted.]

The Massachusetts statute provides for the addition of interest from the date of the writ. Chapter 229, section 11.

The judgment is reversed and the cause remanded for entry of judgment in conformity with this opinion.

KAUFMAN, *Circuit Judge* (dissenting):

Marilyn W. Pearson, widow and administratrix of the estate of John S. Pearson, commenced the present action (on behalf of the estate) against Northeast Airlines, Inc. in a federal district court (S. D. N. Y.) to recover for the death of her husband. Mr. Pearson was a passenger aboard a Northeast Airlines plane, en route from New York, N. Y. to Nantucket Island, Massachusetts. The plane crashed in the vicinity of Nantucket on August 15, 1958. After a 6 day trial a jury found that the airline's negligence was the sole and proximate cause of Mr. Pearson's death; and that Northeast Airlines was liable for

---

[8] This court came to the same conclusion as to the effect of the *Kilberg* dictum. *St. Clair* v. *Eastern Air Lines, Inc.*, 2 Cir., — F. 2d — (April 24, 1962).

the resulting pecuniary damages sustained by Mrs. Pearson. A judgment of $160,150.65 was entered for the plaintiff including pre-judgment interest calculated from the day Mr. Pearson died.[1]

On appeal, the airline does not assert that Judge McGohey committed any evidentiary errors which require reversal and a new trial. Furthermore, it does not argue that the jury's verdict was contrary to the weight of the evidence, or that its award was unjustified by plaintiff's proof of pecuniary loss. Instead, the appeal is based primarily upon the airline's assertion that Mrs. Pearson, as a matter of law, is limited to a recovery of $15,000.[2] With respect to this contention, the airline concedes, as it must, that a federal trial court sitting in a diversity jurisdiction case is required to apply the substantive law of the forum state; and that the court below correctly interpreted the applicable state law declared in 1961 by New York's highest court in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, a case which involved an identical claim against the same airline under like circumstances (the death of one of Mr. Pearson's fellow passengers on the ill-fated flight). Furthermore, the airline agrees that Judge McGohey instructed the jury on this issue in accordance with the *Kilberg decision*. Thus, it would seem clear that if Mrs. Pearson had filed her complaint in the

---

[1] The Court is in agreement that a partial reduction of the amount of interest added to the jury's verdict is necessary. See majority opinion, *supra*. Therefore, I shall not deal with this question.

[2] Appellant also contests the manner in which pre-judgment interest was computed, see n. 1, *supra*, and the standard used for measuring its liability. The latter issue is not resolved because it was rendered moot by the majority decision. However, it is considered in this dissent, and I have concluded that the appellant's contention on this point is without substance. See pp. 2631-32, *infra*.

New York Supreme Court, rather than across the street in the United States District Court, the same principles of substantive law declared by the New York Court of Appeals would have been applied. Consequently, it is the airline's position that both state and federal courts would be acting unconstitutionally if they applied the conflict of laws doctrine enunciated by the New York Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc.*, *supra*, because that doctrine violates the federal Constitution's Full Faith and Credit Clause.[3] A majority of this Court agrees with the airline. I share the opinion of the New York Court of Appeals (per Desmond, Chief Judge) that the *Kilberg* rule is constitutionally sound. *Id.*, 9 N. Y. 2d 41-42, 211 N. Y. S. 2d 137-138.

As I have indicated, no doubt is left as to the rules of substantive liability which New York courts would apply in a wrongful death action maintained for the death of a New York domiciliary in a plane crash occurring within Massachusetts borders under the circumstances of this case. In *Kilberg* the New York Court of Appeals voiced concern about a problem which had become increasingly important as the use of air transportation expanded, and, for various reasons, fatal accidents become more frequent. The court was concerned because "Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they [sic] move."[4] Considering the vast air transportation network centered in New York, the court pointed out that:

"An air traveler from New York may in a flight of

---

[3] U. S. Const., art. IV, §1. See also 28 U. S. C. §1738, which implements the constitutional provision.

[4] *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 39, 211 N. Y. S. 2d 135.

> a few hours' duration pass through several . . . commonwealths. His plane may meet with disaster in a state he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. *The place of injury becomes entirely fortuitous.*" *Id.* (italics added).

The opinion observed that a small number of states still retained wrongful death statutes with provisions severely limiting an airline's liability to its passengers for fatal accidents caused by its negligence. Thus, under the *lex locus delicti* choice of law rule ordinarily used, such limitations would be applied against New York citizens when accidents occurred within the borders of those states. The court recalled that when the men who framed the New York Constitution in 1884 were urged to limit the recovery allowed for loss of human life in that state, and to incorporate a provision substantially similar to the $15,000 limit found in the Massachusetts statute,[3] the proposal was rejected as being "absurd and unjust, in measuring the pecuniary value of all lives, to the next of kin, by the same arbitrary standard." The reaction was so strong that a provision which prohibited the legislature from enacting any such statute was adopted instead. The opinion suggested that in the 66 years since the New York Constitution was written the absurdity and injustice of fixed limitations enacted in other states had become "increasingly apparent." Concluding that it was the duty of the judiciary to provide protection for our own State's people against unfair and anachronistic treatment of the

[3] Massachusetts has since amended its law to permit a recovery up to $20,000. Mass. Gen. Laws Ann. ch. 229, §2.

lawsuits" resulting from airplane disasters in those states, Chief Judge Desmond announced that henceforth New York courts would no longer apply such limitations because they were "completely contrary" to New York's public policy.[6] Within the last few weeks, the Court of Appeals has again indicated distinctly and definitely that the principles stated in *Kilberg* reflect the law of New York. See *Davenport* v. *Webb*, 11 N. Y. 2d —— (June 12, 1962). And the court also has stated with unmistakable clarity that the *Kilberg* decision rests exclusively upon the considerations of public policy which I have described.[7]

At the threshold of my consideration of the constitutional implications of the *Kilberg* decision, I pause to note that *Kilberg* did not work any revolution in traditional conflict of laws philosophy. The case involved nothing more than a particular application of a doctrine well established in New York and elsewhere that a state may refuse to apply principles of substantive law "borrowed" from other states in accordance with standard choice of law rules, when the foreign principles conflict with some

---

[6] *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 39, 211 N. Y. S. 2d 133.

[7] In *Davenport* v. *Webb*, *supra*, the plaintiffs-appellants argued that rules concerning pre-judgment interest were "procedural" because they merely affected the measure of damages, so that New York procedural law should be applied regardless of *lex locus delicti*. The Court of Appeals rejected this argument as follows:

> "Plaintiffs point to language in the *Kilberg* opinion to the effect that 'it is open to us * * * to treat the measure of damages in this case as being a procedural or remedial question controlled by our own state policies' (9 N. Y. 2d, supra, at pp. 41-42). In *Kilberg* the court was confronted with a question of state public policy requiring decision. *Kilberg* * * * must be held merely to express this state's strong public policy with respect to *limitations* in wrongful death actions." *Id.* at 230 N.Y.S. 2d at p. 19, 172 N.E. 2d at p. 904.

fundamental public policy of the forum. See Stumberg, *Conflict of Laws* 198 (2 ed. 1951); *Coster* v. *Coster*, 289 N. Y. 438, 442, 46 N. E. 2d 509, 512 (1943); *Mertz* v. *Mertz*, 271 N. Y. 466, 473, 3 N. E. 2d 597, 599 (1936).[8] Moreover, as revealed in a comprehensive analysis of the "public policy" concept as it pertains to choice of law rules,

> "All the commentators would retain the public policy principle in conflicts to the extent that it is grounded in basic moral conceptions or in ideas of fundamental justice, and we agree. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, the law should not be applied. The principle can be defended on the ground that above all, any court's job is to aim at the just accommodation of controversy or, perhaps, with the notion that the decisions of courts should not 'exhibit to the citizens of the state an example pernicious and detestable.' [*Greenwood* v. *Curtis*, 6 Mass. 358, 378 (1810)]."
>
> Paulsen and Sovern, *"Public Policy" in the Conflict of Laws*, 56 Colum. L. Rev. 969, 1015 (1956).

Whether the "public policy" doctrine has been used in order to avoid necessary re-evaluation of outmoded and inadequate choice of law rules, a criticism suggested by

---

[8] Massachusetts courts were among the first in this country to use the public policy concept when foreign law was repugnant to fundamental tenets of that state's jurisprudence. See *Greenwood* v. *Curtis*, in the Paulsen and Sovern article quoted above. In *Blanchard* v. *Russell*, 13 Mass. 1, 6 (1816), the court said that "* * * the judicial power will exercise a discretion with respect to the laws they may be called upon to sanction; for, if they should be manifestly unjust, or calculated to injure their own citizens, they ought to be rejected." See *Higgins* v. *Central New England & W. R. Co.*, 155 Mass. 176, 29 N. E. 534 (1892); *Jackson* v. *Anthony*, 282 Mass. 540, 185 N. E. 389 (1933).

Professors Paulsen and Sovern, or, as Professor Cavers has observed, whether it is used as an avenue of escape from mechanical rules creating injustice, see Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173, 183 (1933),

> "It is apparent * * * that in most cases the choice of local rather than foreign law [because of "public policy"] cannot be regarded simply as a matter of parochialism. The common invocation of the public policy argument is * * * an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it." Paulsen & Sovern, *op. cit. supra*, at 981.

In *Kilberg*, the New York Court of Appeals, *in essence*, made precisely that assertion. The court continued to recognize a number of Massachusetts substantive rules incidental to plaintiff's claim, and thereby paid lip service to the *lex locus delicti* rule. But its refusal to recognize the "entirely fortuitous" circumstance of an airplane's fatal descent into Massachusetts territory as compelling an application of an "absurd and unjust" limitation (which would result in "anachronistic" treatment of lawsuits for wrongful death in New York courts) is best explained as an assertion of New York's right to apply its own "internal" law to this issue. See Paulsen & Sovern, *supra* at 980-981, 992-998.

This brings us to what I consider the fundamental error in the holding in this case. Although the majority does not explicitly declare that New York could not choose to ignore the Massachusetts wrongful death statute in its entirety, and that New York was forbidden from applying a form of New York "internal" law in the present case, I believe its holding must lead us to that position. The

reference to *First National Bank of Chicago* v. *United Air Lines, Inc.*, 342 U. S. 396, 400 (1952), in which Justice Jackson asked by way of rhetorical question whether the Constitution prevents a forum state from applying its own law where "a transaction is so associated with one jurisdiction" (i.e., another state), reinforces my belief that the majority has decided that the law of *lex locus delicti* must under all circumstances be applied to define liability. This conclusion is given added strength by other references to language in opinions by Justice Holmes in two early cases (1904)[9] suggesting that foreign law, "the source of the obligation" upon which a plaintiff "absolutely" depends, must be applied in its entirety. Moreover, I would suppose that if the majority agreed that New York *could* ignore Massachusetts law in its entirety, because (a) it chose to apply its own "internal" law to a transaction having substantial New York contacts, or (b) because Massachusetts law is repugnant to its public policy (which is probably another way of saying the same thing insofar as *Kilberg* is concerned), it would necessarily have to agree that New York could apply Massachusetts rules *except* for the obnoxious limitation on the amount of recovery.

If this analysis of the Court's decision is correct, the *ratio decidendi* may be stated as follows: The crash of the airplane in which Mr. Pearson was traveling created certain unalterable rights against Northeast Airlines, fixed at the instant of the disaster, and definable exclusively in terms of then existing Massachusetts law, which may be enforced wherever Northeast Airlines is found—but only as permitted by the Massachusetts legislature.

---

[9] *Slater* v. *Mexican National R.R. Co.*, 194 U. S. 120 (1904); *Davis* v. *Mills*, 194 U. S. 451 (1904).

Concisely stated in this manner, the decision is immediately recognized as nothing more than an application of the "vested rights" doctrine of territorial sovereignty. This doctrine, popular among conflict of laws theorists in the late 19th and early 20th Century, was given color of respectability by Justice Holmes in the two cases (cited by the majority) decided almost a half century ago. But the highly refined conceptualism which at one time was considered satisfactory by some authorities, has long since ceased to command any appreciable support, and has been discarded in modern jurisprudence.[10] Indeed, the rejection of the "vested rights" doctrine began as early as 1923, in a classic opinion by Judge Learned Hand, who stated that,

> "* * * no court can enforce any law suit but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." *Guinness* v. *Miller*, 291 Fed. 769, 770 (S. D. N. Y. 1923), aff'd, 299 Fed. 538 (2d Cir. 1924), aff'd *sub nom. Hicks* v. *Guinness*, 269 U. S. 71 (1925).

The sound reasoning employed in 1923 by Judge Hand,

---

[10] See Cavers, *Comment: The Two "Local Law" Theories*, 63 Harv. L. Rev. 822, 823 n. 4 (1950) for an explanation of the "vested right" theory and the criticism by Judge Hand and Professor Cook which led to its rejection.

It is important to note that even Justice Holmes rejected the earlier thesis, advanced by Justice Story, that foreign law actually operates in the forum. See Story, *Conflict of Laws*, §23 (8 ed. 1883). Holmes merely proposed that the liability creating event "gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Slater* v. *Mexican National R R. Co.*, *supra* at 126.

which today seems little more than a statement of the obvious, and the manifest inconsistency and inflexibility of the "vested rights" doctrine itself, see Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 Harv. L. Rev. 361, 379-385 (1945) has resulted in its virtual abandonment. As Justice Black recently pointed out, choice of law rules founded on the "vested rights" doctrine have been "repudiated by courts and commentators everywhere • • •, especially as • • • constitutional rule[s]."[11]

Thus, it is too late to argue that for conflict of law purposes, New York courts *enforce* Massachusetts law, or "transitory" obligations (in the Holmes sense) arising from it. In *Kilberg*, as in the present case (in which a federal court, with respect to the substantive law applied, is merely another New York court), the forum "enforces not a foreign right but a right created by its own law." Cook, *The Logical and Legal Basis of the Conflict of Laws*, 20-21 (1942). And the constitutional question is not whether Northeast Airlines is "unjustly" deprived of the "protection" of Massachusetts law—which is not being "enforced." It is whether New York has sufficient interest in this multistate transaction[12] so that it may adopt

---

[11] *Clay* v. *Sun Insurance Office Ltd.*, 363 U. S. 207, 220 (1960) (dissent); see *Zogg* v. *Penn Mutual Life Insurance Co.*, 276 F. 2d 861, 865 (2d Cir. 1960): "[T]he Supreme Court has • • • rejected conceptualistic theories based upon the territoriality of vested rights, adopting instead an approach which looks to the state's governmental interest in the • • • transaction."

[12] The forum state's interest in the multistate transaction may be relevant not only to the state's constitutional right to apply its own law, but to its choice of law, if it follows some version of the "significant contacts" theory, see Cavers, *A Critique of the Choice-of-Law Problem*, 47 Harv. L. Rev. 173 (1933) rather than mechanical choice of law rules based on certain facts. In *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99 (1954) the New York Court of Appeals abandoned mechanical choice of law rules which depended on the "place of contracting" or the "place of performance" in the area

a conflict of laws doctrine which utilizes legal principles modeled on an internal statutory scheme,[13] but created by the state's judiciary. As one of our leading students of this subject has concluded on the basis of an exhaustive review of the relevant Supreme Court cases through 1958, "a state court's choice of law will be upset under the Full

---

of contract law. And this court has already noted that *Kilberg* may represent "something in the nature of the *Auten* rule" as applied to tort cases. *Hausman* v. *Buckley*, 299 F. 2d 696, 704 (1962).

But federal courts in diversity jurisdiction must apply state choice of law rules whether they are deemed wise or unwise. Therefore my consideration of New York's interest in this multistate transaction is confined to the constitutional question, although there is necessarily an overlapping on the choice of law issue as well. A *caveat* is in order: there may be sufficient "contacts" to give New York the constitutional *power* to apply its own law, although the "contacts" are insufficient to make such action wise as a matter of conflict of laws policy. It is true here, as in other areas of the law, that the Constitution can permit a state to do something that is unwise or undesirable.

[13] As the majority correctly states, the Court of Appeals in *Kilberg* did indicate that Massachusetts rules of liability were not being discarded except for the $15,000. limitation. Moreover, since both New York and Massachusetts authorized wrongful death suits against common carriers, the court did not have to decide whether it was applying the New York statute on the single issue of limitation, or whether it was creating a common law for the case. See *Kilberg* v. *Northeast Airlines, Inc.*, *supra* n. 6. However, in *Davenport* v. *Webb*, *supra*, the court indicated a continuing belief that the New York statute does not extend to accidents occurring within the geographical borders of another state. 61 Colum. L. Rev. 1497, 1509 (1961).

Although this is true, it may still be argued that in *Kilberg*, by striking out the Massachusetts rules governing liability, the court left a vacuum on the question of limitation which could not prevent a plaintiff from recovering in excess of the missing $15,000. limit. A more attractive explanation is that once the court struck the limitation provision, it filled the resulting void with a rule of law allowing unlimited recovery, created by the court on the model of the New York wrongful death statute. Although this may be a matter of semantics, since the result is the same under either analysis, I have chosen the latter theory because it is more conducive to the constitutional analysis.

Faith and Credit Clause or the Due Process Clause[14] only when the state whose law is applied has no legitimate interest in its application." Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 75 (1958).[15] And the validity of Professor Currie's conclusion has been demonstrated by a recapitulation of case law made by Chief Justice Warren, speaking for a unanimous court in the recent case of *Richards* v. *United States*, 369 U. S. 1 (1962):

> "Where more than one state has sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the

---

[14] Although the majority opinion does not discuss appellant's assertion that application of the *Kilberg* rule in this case would deprive it of due process of law, the close relation between that argument and appellant's argument under the Full Faith and Credit Clause leaves no doubt that if considered, the majority would find a due process violation as well. "The areas in which these two clauses operate are not coterminous • • • Yet • • • the degree of overlap is large • • • because the essential principle underlying the operation of both clauses is the same; neither interferes with choice of law except when the law applied is that of a state having no legitimate interest in the application of its policy to the case at hand." Currie, *op. cit. supra* at 15. See *Watson* v. *Employers Liability Assurance Corp., Ltd.*, 348 U. S. 66 (1954); Weintraub, *Due Process and Full Faith & Credit Limitations in a State's Choice of Law*, 44 Iowa L. Rev. 449 (1959).

Finding as I do that application of *Kilberg* to this case does not violate the Full Faith and Credit Clause, I also reject the due process argument on essentially the same grounds, although it seems inappropriate under the circumstances to elaborate on that issue in any detail.

[15] Professor Reese has written of the constitutional limitations on a state's choice of law: "Due process no longer forbids a state from applying its own law unless it has no reasonable contact with the transaction, and, where such a reasonable contact exists, full faith and credit does not compel a state to apply another's law in preference to its own." Reese *Full Faith and Credit to Statutes: The Defense of Public Policy*, 19 U. Chi. L. Rev. 339, 342 (1952).

> states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity." *Id.*, at 15.

Therefore, the precise question which must be decided in this case is whether New York has a "sufficiently substantial contact" with the events surrounding the action maintained by Mrs. Pearson for the death of her husband in this particular airplane crash.

It is not yet entirely clear what contacts are sufficient to permit a state to apply its own substantive law to a wrongful death action where the physical impact causing death occurs in another jurisdiction. Cf. Note, 74 Harv. L. Rev. 357, 388 (1960). The majority, by its failure to analyze the various interests found in the present case, would seem to indicate that only the existence of "impact" within a state's borders results in a contact substantial enough to withstand constitutional objection. But it is perfectly clear that the *lex locus delicti* doctrine has not been incorporated into the fundamental law of the land by virtue of the Full Faith and Credit Clause. In *Richards* v. *United States*, *supra*, the Supreme Court held that *either* the state in which impact occurs—usually considered the locus of the tort,[16] *or* (when different) the state in which the wrongful act or omission occurs, may constitutionally apply its wrongful death law to the transaction. Thus, it is immediately perceived that the majority decision is wholly undermined unless it is construed to permit application of the *Kilberg* rule in a situation where there is

---

[16] Restatement, *Conflict of Laws*, §377, comment (a), Note (1), contains this illustration: "A, standing in state X, fires a gun and lodges a bullet in the body of B who is standing in state Y. The place of wrong is in Y."

proof that a crash resulted from negligent maintenance of the airplane at its New York terminus. With respect to the present case, in which plaintiff pursued a different theory of negligence, there are other substantial interests. For instance, a persuasive argument can be made that New York has an interest in requiring Northeast Airlines to maintain safe facilities elsewhere. The contention could be summarized as follows: Northeast Airlines is a foreign corporation authorized to do business in New York. Pursuant to that authorization, it maintains ticket offices throughout the state, and actively promotes the use of its transportation facilities by New York citizens by widespread advertising and special fares between New York City and cities in other states. It operates a full schedule of flights from New York airports, where it offers various additional conveniences intended to attract patrons from competing airlines. As a result of this business activity, it earns a substantial amount of revenue from New York citizens. Is it unreasonable to suggest that New York, in order to protect its citizens from avoidable dangers which may result in loss of life, e.g., inadequate facilities maintained by the airline in the states to which it transports New York citizens, should promote safety practices by rendering the airline liable for the consequences of such negligence *in the same manner that New York holds airlines liable for negligent acts committed within its borders?* One of the principal justifications of tort liability is its expected effect upon the standard of care used in hazardous operations.[17] Does the majority suggest that New York has any less interest in the airline's safety practices when a plane operating out of a New York airport flies a great

[17] See Holmes, *Common Law*, 144 (1 ed. 1881).

distance over New York territory only to crash a few miles outside of its borders (because the crew was negligent seconds after crossing the state line) than it would if the negligence occurred a few moments earlier?[18] Yet we are told that if the negligence occurred moments before in New York, that state could apply its own law regardless of the place of the crash. See *Richards* v. *United States*, *supra*. As the New York Court of Appeals pointed out in *Kilberg*, the reality of air transportation has emptied such distinctions of real meaning.

In the present case Mr. Pearson, a New York citizen, boarded the airplane at a New York airport, after buying a ticket at the airline's New York offices. On the theory suggested above, New York's contact with this series of events is clear enough, and its interest in preventing negligence which would cause the airplane to crash is self-evident. By contrast, since there is no suggestion of negligence after the crash and no damage to persons or property on the ground "it is doubtful that the application of the Massachusetts wrongful death act in a case such as this . . . would have any real effect on conduct within that state." 74 Harv. L. Rev. 1652, 1654 (1961). Certainly

---

[18] Suppose a New York citizen embarks on a flight operated by a foreign corporation (a citizen of another state having the same public policy with respect to limitation of damages as New York) between two cities in New York, e.g., New York City and Albany. The airline chooses a route that carries the plane over Massachusetts territory for part of the trip. During that brief period the crew is negligent and the plane crashes in the Berkshire Mountains of Massachusetts. Must New York apply the limitation found in Massachusetts law although that state had no connection with the event, except for the fortuity of a moment's negligence and the proximity of its mountains to Albany, when every other contact is found in New York? Aside from the airline's interest in the financial benefits of Massachusetts law, and that of its insurance company, it is difficult to perceive how such a rule enforces "the strong unifying principle embodied in the Full Faith and Credit Clause."

Massachusetts did not expect to reduce the airline's insurance rates by means of its statute. Northeast Airlines operates in many states, and could suffer accidents in any of them.

However, we need not speculate whether New York may constitutionally use its tort law to deter an airline from out of state negligence intimately connected with its New York operation. New York has a well recognized interest in the nature and amount of recovery obtained by dependents of the decedent in a situation such as this, regardless of the place of injury, because the dependents are its own domiciliaries. Wrongful death statutes have their primary justification in state recognition of the wrong inflicted upon the wife and children who remain behind after the death of the breadwinner, and its concern for their future welfare. 74 Harv. L. Rev. 1652, 1653 (1961). In this respect, the instant case presents an even stronger argument for the *Kilberg* rule than the *Kilberg* case itself, in which it is not clear that Mr. Kilberg's dependents were New York domiciliaries.[19] Furthermore, New York's interest in the welfare of its domiciliaries extends beyond the economic and human loss which *they* sustain, since New York has assumed a duty to provide for those unable to maintain themselves. See N. Y. Soc. Welfare Law §131-51.

In *Alaska Packers Ass'n* v. *Industrial Acc. Comm'n of Calif.*, 294 U. S. 532, 542 (1935), the Supreme Court permitted California to compel an employer to pay workmen's compensation to an alien who was injured outside that state in the course of his employment, when the alien's closest contacts were with California. The court noted that unless California made such a remedy available, injured persons such as the alien claimant "* * * would be remedi-

[19] See 61 Colum. L. Rev. 1497, 1511 (1961).

less, and there was the danger that they might become public charges, both matters of grave public concern to the state." A state's interest in protecting its resident domiciliaries is no less than its interest in protecting resident aliens; and analogous considerations suggest that the dependent's domicile has a constitutionally supportable interest in having its wrongful death policy applied. Cf. Note, 74 Harv. L. Rev. 357, 389 (1960).

Further evidence of the importance of plaintiff's domicile as a contact permitting application of the domiciliary state's law is found in *Richards* v. *United States*, *supra*. When the Supreme Court spoke of interests which would permit a state to apply its wrongful death statute to injuries sustained out-of-state, it cited, and thus apparently approved, *inter alia*, *Grant* v. *McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953) where the forum's law as to survival of actions was applied to one resident's suit against another resident's estate because of an accident which occurred outside the state. It also similarly approved *Haumschild* v. *Continental Cas. Co.*, 7 Wis. 2d 130, 95 N. W. 2d 814 (1959), which applied the domicile state's law as to interspousal immunity to a tort committed outside the state. See also Paulsen & Sovern, *op. cit. supra* at 994-998. Finally, in *Hughes* v. *Fetter*, 341 U. S. 609 (1951), a case cited by the majority because of its holding that Wisconsin could not refuse to entertain a wrongful death action based on the law of another state (under its choice of law rules) since Wisconsin had a similar statute of its own, the Court explicitly distinguished that situation from a hypothetical one in which Wisconsin merely applied its own law:

> "The present case is not one where Wisconsin, having entertained appellant's lawsuit, chose to apply its

> own instead of Illinois' statute to measure the substantive rights involved. This distinguishes the present case from those where we have said that 'Prima *facie* every state is entitled to enforce in its own courts its own statutes, lawfully enacted.' *Alaska Packers Assn.* v. *Commission*, 294 U. S. 532, 547"; 341 U. S. 612, n. 10.

I believe this passage from *Hughes* clearly implies that *prima facie* it would have been constitutional if Wisconsin applied its own wrongful death law to the out-of-state accident involved there. Even if this were not true, the case affords no comfort to the majority position. While New York has no anatagonism to wrongful death actions, but only to limitation of liability, New York (unlike Wisconsin) does not close its doors to suits based on Massachusetts rules, but merely refuses to recognize the limitation, *Hughes* v. *Fetter* is therefore distinguishable because the "crucial factor" which led to that decision, "that the forum laid an uneven hand on causes of action arising within and without the forum state," is not present. *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514, 518 (1953).

The majority dismisses the *Wells* case as being unpersuasive in the case at bar. In *Wells*, the Supreme Court manifested obvious willingness to allow states broad power in choice of law matters within the framework of the Full Faith and Credit Clause. The court held that Pennsylvania could apply its own statute of limitations as a bar to a wrongful death action based on Alabama rules of substantive liability (because the impact was in Alabama), although Alabama had provided a longer statute of limitations in the same statute that created the cause of action. As the *Wells* opinion recognized, and as this Court has explained, a "built-in" statute of limita-

tions such as that found in the Alabama wrongful death statute is generally considered part of the substantive law of liability. Thus, *Wells* cannot be distinguished on the grounds that a statute of limitations is merely procedural, and the forum applies its own procedure. See *Hausman* v. *Buckley*, 299 F. 2d 696, 701 (2d Cir. 1962). Nor is the majority's attempt to distinguish *Wells* on the theory that a plaintiff can choose any forum (presumably the forum with the longest statute of limitations), whereas the defendant "will be treated unjustly" if deprived of the "protection" of Massachusetts law. Implicit in the *Wells* decision was a holding that Pennsylvania could apply its own statute of limitations even if it were longer than that provided in the Alabama statute. The Supreme Court explicitly and without qualification stated that the "minimum requirements" of the Full Faith and Credit Clause do not "compel the forum state to use the period of limitation of a foreign state." 345 U. S. 516-517. And see the dictum by Justice Brandeis in *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 409 (1930): "It is true that a State may extend the time within which suit may be brought in its own courts • • • And • • • the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." If Pennsylvania could allow a plaintiff to recover for wrongful death under Alabama rules, although Alabama, the *lex locus delicti* would permit *no recovery whatever*, how does New York violate the constitution when it merely refuses to follow a Massachusetts limit *on the amount of recovery?* Moreover, as I have already pointed out, Northeast Airlines is not being "deprived" of any legitimate defense. The application of only one state's law to a dispute "serves no federal end other than fulfilling the justifiable

expectations of the parties and preventing forum shopping." 74 Harv. L. Rev. 1652, 1655 and authorities cited in n. 24. As I have also noted, Northeast Airlines must be prepared for losses resulting from accidents in any of the states in which it operates aircraft; it does not, and obviously could not rely on the fortuity of a Massachusetts crash. A short answer to the objection against forum shopping is that such considerations were not believed to be of constitutional stature by the Supreme Court in *Wells*. A more elaborate response would suggest that while possible forum shopping is a consideration relating to selection of one choice of law rule rather than another, it is not the only consideration. Clearly a state should be able to define the basic ends for which its judicial system may be used. There is nothing in the Constitution which renders the judiciary of New York or any other state in this country similarly situated impotent because Massachusetts adheres to a policy which they find to be "absurd and unjust." As Lord Ellenborough said in that classic protest against unwarranted extension of a sovereign's power, "Can the island of Tobago pass a law to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction?" *Buchanan* v. *Rucker*, 103 Eng. Rep. 546, 547 (K. B. 1808). The states have not surrendered their legitimate interests in multistate activities to the extent the majority has declared. And, "in the tort action before us, there is little reason to impose a 'state of vassalage' on the forum."[20]

It is significant that in a number of cases this Court has applied the choice of law rule announced in another recent decision by the New York Court of Appeals. See *Auten* v. *Auten*, 308 N. Y. 155, 159-61, 124 N. E. 2d 99, 101-02

[20] *Hughes* v. *Fetter*, *supra*, at 617 (Frankfurter, J. dissenting).

(1954). The *Auten* case has replaced mechanical choice of law rules formerly used in the field of contract law with the more modern "significant contacts" theory. Under the new rule it is possible that a contract entered into by two parties in Massachusetts will be governed by the contract law of New York because, at the time an action on the contract is brought, New York has more significant contacts with the transaction. This result is possible even though the parties never supposed that New York law would apply when the contract was written. See e.g., *Zogg* v. *Penn Mutual Life Ins. Co., supra*, n. 11. It is difficult to understand how my brothers in the majority, who participated and concurred in a number of the previous decisions of this Court applying the *Auten* rule, see cases cited in *Hausman* v. *Buckley, supra*, at 704, n. 12,[21] are now concerned about the constitutionality of the *Kilberg* rule—because it deprives a tortfeasor of the benefits of a law upon which the tortfeasor could not rely.

Since *Auten*, by contrast, will often result in the application of the contract law of a state upon which parties did in fact rely, the present decision seems to suggest that *Auten* will also be sent to its demise because of some conflict with inexplicable considerations purportedly derived from the "unifying principle" of the Full Faith and Credit Clause. If this is true, I am concerned that experimentation in the field of conflict of laws will come to an abrupt end. As adroitly stated by a leading constitutional authority, Professor Paul A. Freund,

> "If the task of Conflict of Laws is to understand, harmonize, and weigh competing interests in multi-

[21] In at least one instance the *Auten* rule was "borrowed" in the formulation of "federal common law." *Purofied Down Products Corp.* v. *Travelers Fire Ins. Co.*, 278 F. 2d 439 (2d Cir. 1960).

> state events, and if the desideratum of uniformity will be approached most satisfactorily by evolving rules that deliberately seek these objectives, then we seem to be hardly ready for a set of precepts imposed in the process of Supreme Court decision as fixed canons of constitutional law." Freund, *Chief Justice Stone & the Conflict of Laws*, 59 Harv. L. Rev. 1210, 1235-36 (1946).

I believe that the dull conformity which may result from the use of the Full Faith and Credit Clause as a straitjacket confining the body of conflict of laws doctrine is far less desirable than the results which may be achieved by a more flexible interpretation of the Constitution. See Note, 30 N. Y. U. L. Rev. 984, 992 (1955).

One additional problem remains to be considered. Judge McGohey refused to apply the Massachusetts standard of measuring damages, which bases an award on the degree of the defendant's culpability rather than the extent of the pecuniary loss sustained by the dependents (which is the New York standard). Appellant argues that *Kilberg* does not require such disregard of the Massachusetts rule. I disagree. Although New York has no policy against an award of pre-judgment interest from the date of the serving of a writ (Mass.) rather than the date of death (N.Y.), see *Davenport* v. *Webb*, *supra*, its policy against limitations on the amount of damages is necessarily applicable with like force to the standard by which the amount of damages is calculated.

The Supreme Court has pointed out in a converse situation involving the applicability of the limitation provision of the Massachusetts law, "• • • where punitive damages only are allowed for wrongful death, a limitation on the amount of liability has no relevance to the policy of plac-

ing limits on liability where damages are only compensatory." *Mass. Bonding & Ins. Co.* v. *U. S.*, 352 U. S. 128, 133 (1956). Similarly, having dispensed with the limitation, the culpability standard has no meaning. Under the Massachusetts rule, although the defendant has breached his duty of due care, the jury may award a minor amount of damages because the negligence was, so to speak, "not too bad." A jury may be able to determine (by some vague and indefinite standard) the effect of relative degrees of culpability on the amount to be awarded, because, presumably, $15,000 represents the amount to be awarded where the worst behavior causes death. See *Mass. Bonding & Ins. Co.* v. *U. S.*, *supra*. But the application of the Massachusetts standard when there is no limit on the amount of recovery can only result in a purely speculative award. Moreover, the standard of culpability, by its total disregard for the injury actually sustained by the decedent's dependents, violates the primary purpose of most wrongful death legislation, including that of New York, which is concern for the pecuniary loss of the beneficiaries who remain behind. See 2625, *supra*. Thus, Congress rejected it as a basis for measuring federal government liability for wrongful deaths, resulting from negligence of its employees in Massachusetts. *Mass. Bonding & Ins. Co.* v. *U. S.*, *supra*. For these reasons, I believe that New York courts would not apply the Massachusetts culpability standard, and would adopt the pecuniary loss standard used by Judge McGohey on an analogy to the New York statute.

Therefore, I would affirm the judgment below, with such modification of the award for interest as may be required.

Opinion of Court of Appeals *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 297—September Term, 1961

(Argued before the panel April 11, 1962

Panel Decision July 11, 1962

Rehearing *en banc* ordered September 13, 1962

Rehearing *en banc* decided November 8, 1962)

Docket No. 27350

MARILYN W. PEARSON, as Administratrix of the Goods, Chattels and Credits of John S. Pearson, deceased,
Plaintiff-Appellee,

v.

NORTHEAST AIRLINES, INC.,
Defendant-Appellant.

Before: LUMBARD, *Chief Judge*,

CLARK, WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS and MARSHALL, *Circuit Judges*.

Appeal from a judgment of $160,204.65, entered upon a jury verdict in the United States District Court for the Southern District of New York, McGohey, J. The judge

ruled, on a motion to limit damages, that the $15,000 limitation of the wrongful death statute of Massachusetts, where the death occurred, was inapplicable. Judgment affirmed as modified.

HAIGHT, GARDNER, POOR & HAVENS, New York, N. Y. (William J. Junkerman and Douglas B. Bowring, New York, N. Y., of counsel) for defendant-appellant.

FRANK G. STERRITTE, New York, N. Y., and SPEISER, SHUMATE, GEOGHAN & LAW, New York, N. Y. (Stuart M. Speiser and Florindo M. DeRosa, New York, N. Y., of counsel) for plaintiff-appellee.

KAUFMAN, *Circuit Judge*, with whom Judges CLARK, WATERMAN, SMITH, HAYS and MARSHALL concur:

The principal question considered by this Court *en banc* is whether a federal court sitting in the state of New York may constitutionally "apply" a Massachusetts statute giving a cause of action for wrongful death and refuse, for reasons of state policy, to follow a provision of that statute which would limit the plaintiff's recovery to $15,000. The question arises in an action for wrongful death occasioned by a plane crash in Massachusetts. The action was brought in the United States District Court for the Southern District of New York, and was tried before Judge McGohey. The judge ruled that plaintiff's recovery was not bound by the arbitrary limit of $15,000 provided by Chapter 229,

section 2, of the Massachusetts General Laws.[1] In so doing he relied on the holding of the New York Court of Appeals, in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N. Y. 2d 34 (1961). The jury thereafter awarded damages well in excess of the statutory maximum and judgment was entered accordingly.[2] From this adverse judgment, the defendant airline appealed to this Court, claiming, *inter alia*, that the recovery should have been limited, as a matter of law, in accordance with the Massachusetts statute. The appeal was first heard by a panel of this Court consisting of Chief Judge Lumbard, Judge Swan and this writer. A majority of that panel held, over my dissent, that the Full Faith and Credit Clause of the United States Constitution[3] barred New York courts, and a federal court hearing an action brought in New York by virtue of diversity jurisdiction, from awarding un-

---

[1] *Pearson* v. *Northeast Airlines, Inc.*, 199 F. Supp. 539 (S.D.N.Y. 1961).

This section of the Massachusetts General Statutes reads: "Damages for death by negligence of common carrier. If the proprietor of a common carrier of passengers * * * causes the death of a passenger, he or it shall be liable in damages in the sum of not less than two thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents, and recovered and distributed as provided in section one, and to the use of the persons and in the proportions, therein specified."

The statute has since been amended to raise the upper limit of recovery to $20,000. Mass. Gen. Laws Ann. Ch. 229, §2 (Supp. 1961).

[2] The jury brought in a verdict in the sum of $134,043.77. The court's judgment was later amended to include an additional $26,160.88 of interest.

[3] Article IV., Section 1. "Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof."

limited recovery in a lawsuit "based" upon the Massachusetts statute.[4] The issue being one of great significance—the constitutional power of the states to develop conflict of laws doctrine—it was ordered, upon application by the plaintiff-appellee and the affirmative vote of a majority of the active judges of this circuit, that the appeal be reheard *en banc*.[5]

As a consequence of this rehearing and extensive reconsideration of the issues and pertinent authorities, six active judges of this Court have reached a conclusion contrary to that of the majority of the original panel, and adopt this writer's dissent from the opinion of the panel, appearing at 307 F. 2d 136 (1962). We hold that the ruling of the New York Court of Appeals in *Kilberg* was a proper exercise of the state's power to develop conflict of laws doctrine; and the court's refusal to apply the limitation of recovery provision in the Massachusetts statute a constitutional exercise of such power. The judgment of the District Court is therefore affirmed, as modified in accordance with the panel's unanimous holding on the issue of pre-judgment interest. This issue requires no further discussion.[6]

Several additional considerations which we shall discuss, convince us that the conclusion we have reached is compelled.

The essential facts are not in dispute. Marilyn W. Pearson, widow and administratrix of the estate of John S. Pearson, and a citizen and domiciliary of New York, commenced the present action against Northeast Airlines,

---

[4] *Pearson* v. *Northeast Airlines, Inc.*, 307 F. 2d 131 (2d Cir. 1962).

[5] See 28 U.S.C. §46(c) (1958).

[6] See 307 F. 2d at 136.

Inc. to recover damages for the death of her husband, allegedly caused by the defendant's negligence. Northeast Airlines is a Massachusetts corporation authorized to do business in New York. Pursuant to that authorization, it maintains ticket offices throughout the state, and actively promotes the use of its transportation facilities by New York citizens by means of widespread advertising. It operates a full schedule of flights from New York airports and earns a substantial amount of revenue from New York citizens. The decedent, a New York citizen and domiciliary, purchased his flight ticket at the New York offices of Northeast Airlines. He boarded the Northeast plane at La Guardia Airport, in the City of New York, bound for Nantucket Island, Massachusetts, and on the evening of August 15, 1958, the decedent's plane crashed in the vicinity of Nantucket.

Another action, having no connection with the Pearson family, had already been maintained in the courts of the State of New York by the administrator of Edward J. Kilberg, also a passenger on the same ill-fated flight to Nantucket.[7] The highest court in New York ruled in that case that the action, by virtue of New York choice of law rules, was properly founded upon the liability created by the Massachusetts Wrongful Death Act. It stated, however, that New York courts should, if appropriate, award

---

[7] *Kilberg* v. *Northeast Airlines, Inc.*, supra.

This case has, in the short period of time since its resolution, garnered an inordinately large amount of space in legal periodicals. See 25 Albany L. Rev. 313; 15 Ark. L. Rev. 187; 41 B. U. L. Rev. 257; 27 Brooklyn L. Rev. 336; 49 Calif. L. Rev. 187; 61 Colum. L. Rev. 1497; 46 Cornell L. Q. 637; 30 Fordham L. Rev. 170; 49 Geo. L. J. 768; 74 Harv. L. Rev. 1652; 36 N. Y. U. L. Rev. 723; 37 Notre Dame Lawyer 194; 15 Rutgers L. Rev. 620; 35 St. John's L. Rev. 357; 12 Syracuse L. Rev. 395; 28 U. Chi. L. Rev. 733; 39 U. Cin. L. Rev. 511; 15 Vand. L. Rev. 271; 47 Va. L. Rev. 692.

damages in excess of the statutory $15,000 maximum recovery required by the Massachusetts statute. Fundamental New York policy, given expression by a state constitutional provision prohibiting the New York legislature from enacting any such limitation, was held to prevent New York courts from applying the limitation by means of court-made law. The court emphasized that the limitation was deemed by the 1894 drafters of the state constitution to be "absurd and unjust, in measuring the pecuniary value of all lives, to the next of kin, by the same arbitrary standard."[7a] In effect, the Court of Appeals of the State of New York, in *Kilberg*, fashioned a rule of law allowing recovery of damages without arbitrary limit, modeled on the New York Wrongful Death Statute,[8] although the Massachusetts statute still served as the foundation for plaintiff's cause of action for wrongful death. Judge McGohey, constrained by the edict of *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), and *Erie R.R.* v. *Tompkins*, 304 U. S. 64 (1938), properly applied the principles of New York conflict of laws enunciated in *Kilberg* and declined to recognize the Massachusetts limitation upon liability.

This writer has already criticized the argument apparently adopted by the panel opinion, that New York was constitutionally disabled from applying its own substantive rules of law to a cause of action arising out of a plane crash in Massachusetts. See dissent, 307 F. 2d at 136. Although Judge Swan did not expressly approve this proposition of constitutional law, the inference seemed

---

[7a] See *Medinger* v. *Brooklyn Heights R. R.*, 6 App. Div. 42, 46, 39 N. Y. Supp. 613, 616 (1896).

[8] See note 13 of this writer's dissent from the panel opinion. 307 F. 2d at 141.

inescapable that, in effect, the panel majority had exalted the *lex loci delictus* to constitutional status with the consequence that New York was barred from applying the whole or any part of its own wrongful death policy to the events occurring in Nantucket.[9] If this is indeed the rationale of the panel's opinion, then it is the first decision to "freeze" into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence—at a time when that jurisprudence is in an advanced stage of thaw.[9a] A majority of this Court rejects this rationale for the same reasons which prompted this writer to reject it in his dissenting opinion.

It is suggested, however, that a different constitutional analysis supports the result reached by the panel. The proponents of this analysis are willing to assume that New York's "contacts" with the transaction are sufficient to support an application of New York's entire wrongful death statute to this accident although it occurred outside the territory of New York. In adopting this approach they would concede that the facts of this case—i.e., (a) Mr. Pearson's purchase of his airplane ticket at a New York office of a foreign corporation doing a large part of its business in New York; (b) his attempt to travel from New York, where he was domiciled, on a regularly scheduled flight most of which was conducted over New York; and (c) the New York domicile of his wife, administratrix and beneficiary under the Wrongful Death Act—are so closely related to the State of New York that it would have the constitutional power to apply its own wrongful death law

---

[9] See 307 F. 2d at 139-40.

[9a] See, e.g., *Hausman* v. *Buckley*, 299 F. 2d 696 (2d Cir. 1962); *Zogg* v. *Penn Mutual Life Ins. Co.*, 276 F. 2d 861 (2d Cir. 1960).

to this litigation. However, the proponents of this constitutional analysis would deem it contrary to the mandate of the Full Faith and Credit Clause if New York were to entertain a claim for wrongful death "under" the Massachusetts act but apply New York principles governing the extent of permitted recovery. In summary, they urge that once a New York court recognizes a claim for wrongful death based on Massachusetts law, that law must control every incident of the claim. They argue that New York is not required to give *any* faith or credit to the Massachusetts act, but once it gives Massachusetts law *some* faith and credit it must also give it *full* faith and credit.

We find this construction of the constitutional mandate untenable. Despite the resourceful arguments put forth in its behalf, we are not persuaded that a statutory limitation upon the amount of money that may be recovered should merit any greater obeisance than statutory limitations addressed to the length of time during which the action may be brought, or to the parties who are empowered to bring that suit, or to the survival or abatement of the cause of action upon the death of the injured party. In each instance the statute qualifies the rights and obligations to which the statutory cause of action gives birth.

We are directed to no precedent, and are unaware of any compelling logic independent of precedent, which requires a state to enforce such statutory qualifications whenever it chooses to recognize a foreign-based cause of action.[10] For example, the cases are numerous in which

---

[10] Most of the cases urged on behalf of the principle that the maximum-liability provision is an inseparable part of the right and therefore must be enforced by the forum are relics of the vested-rights theory, sufficiently discussed by this writer in 307 F. 2d at 140-42. See e.g., *Davis* v. *Mills*, 194 U. S. 451 (1904); *Slater* v. *Mexican National R. R.*, 194 U. S. 120 (1904); *Northern*

a forum state applies its own statute of limitations despite the fact that a limitations period of different duration is expressly incorporated in the statute of the foreign jurisdiction creating a cause of action. See, e.g., *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152 (2d Cir. 1955). This is usually accomplished by referring to the statute of limitations as involving mere "procedure" and not "substance". The niceties of such legal legerdemain do not concern us; it is the result that speaks loudly. The Supreme Court has specifically held that a state does not

---

Pac. R. R. v. *Babcock*, 154 U. S. 190 (1894). It should further be noted that the Court in these cases analyzed the problem in terms of a proper independent choice-of-law by the federal courts, before the advent of *Erie* v. *Tompkins*; they therefore hardly determine the question whether a state has *constitutional power* to analyze conflict of laws questions in terms of separate issues.

One of the cases urged most forcefully in support of the constitutional analysis under discussion is *Order of United Commerical Travelers of America* v. *Wolfe*, 331 U. S. 586 (1947). It was there held that a South Dakota court enforcing rights created by the constitution of a fraternal benefit association incorporated under Ohio law had to apply Ohio law regarding the statute of limitations. But the Supreme Court did not, in that case, say that South Dakota could have *completely* ignored Ohio law and applied its own and that once having applied Ohio law on contract rights it also had to apply Ohio law regarding the statute of limitations. What the Court did do there was actually to compare and balance the interests and contacts of South Dakota and Ohio; it held that the interests of the former were not as significant as those of the latter and that, under the Full Faith and Credit Clause, Ohio law had to be fully applied. To that extent, we consider *Wolfe* to have been superseded by *Richards* v. *United States*, 369 U. S. at 15. "Where more than one state has sufficiently substantial contact with the activity in question, the forum state, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity."

At any rate, *Wolfe* dealt with an admittedly unique situation, the relationship between members of a fraternal benefit society. The Court's own language leads us to believe that *Wolfe* would not be controlling in this case. See 331 U. S. at 605-06, and at 641-42 (dissenting opinion).

violate the Full Faith and Credit Clause in applying its statute of limitations so as to bar a cause of action still viable in the *locus delicti*. See *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514 (1953). The *Wells* case tells us that this is true even though the forum state is refusing to apply a statute of limitations "built into" a statutory cause of action for wrongful death as an "integral" or "substantive" provision.

Despite the effort in *Wells* to pierce to the core of the constitutional issue rather than be occupied by mere labels, we are told that the case is not controlling in the litigation before us, because statutes of limitations involve merely matters of "procedure", of judicial house-keeping. We are further told in buttress of this proposition that it is sheer verbiage to say that the difference between a right limited to $15,000 and one that may run to $160,000 is mere "procedure". But the verbiage is equally thin that would explain any constitutional distinction between time limitations and dollar limitations as one between "procedure" and "substance". It is true that one of the purposes of the statute of limitations is to relieve a court system from dealing with "stale" claims where the facts in dispute occurred long enough ago that evidence is either forgotten or manufactured. But the wide variety of statutory periods cannot be explained solely on the basis of stale evidence. There is no doubt another element, of a more "substantive" character, which might be described as a concern for the interests of the potential defendant.[11]

[11] There can be no doubt that statutes of limitations embody a concern for the speedy disposition of claims within a reasonable period after their origin, for the protection of the defendant from protracted fear of litigation. This seems to be the very reason that the period of limitations in wrongful death cases is usually shorter than that of the ordinary action of negligent torts. The fact that

We do not rest, however, on cases upholding the constitutional power of the forum to disregard the statute of limitations of the *locus delicti*. The Supreme Court has, within the past year, cited with approval two cases emanating from the highest courts of two of our states which applied a rule of local law to govern an incident of a cause of action based upon the law of a foreign state. See *Richards* v. *United States*, 369 U. S. 1, 12 n. 26 (1962). In *Grant* v. *McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953), Judge Traynor, speaking for the California Supreme Court, held that although the cause of action for personal injuries was based upon Arizona law, the matter of its survival or abatement was sufficiently of local concern to be governed by the law of the forum. In *Haumschild* v. *Continental Cas. Co.*, 7 Wis. 2d 130, 95 N. W. 2d 814 (1959), the second case cited with approval by the Supreme Court, the law of the forum and of the parties' domicile as to interspousal immunity was applied to a tort committed outside the state. Surely these cases cannot be dismissed with an invocation of the substance-procedure dichotomy.

Our decision cannot, therefore, be interpreted to condone a forum's applying its own rules in a wanton manner by labeling matters "procedural" while arbitrarily choos-

---

statutes of limitations in wrongful death actions are usually denominated "substantive", see Retatement, Conflict of Laws §397, clearly reveals that the policies they embody are not merely those of judicial housekeeping. *Compare* N. Y. Dec. Est. Law §130 (two-year period of limitations for wrongful death action) *with* N. Y. Civ. Prac. Act § 49 (three-year period for negligent injury to property or person). That "stale evidence" is not the only reason for statutes of limitations is corroborated by the fact that the very same complex of facts may give rise to both a cause of action in contract or quasi-contract and a cause of action in tort; it is almost universally true that the statute of limitations on each such cause of action will differ in length. See Restatement, Torts § 899, Comment b.

ing the parts of a foreign statute it wishes to enforce by labeling them "substantive".[12] We do hold, however, that a state with substantial ties to a transaction in dispute has a legitimate constitutional interest in the application of its own rules of law. If, indeed, those connections are wholly lacking or at best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law. See, e.g., *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930); Currie, "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function," 26 U. Chi. L. Rev. 9, 75 (1958). But that is, *ex hypothesi*, not the case before us.

The argument advanced, that once New York gives *some* faith and credit to the Massachusetts statute it must give it *full* faith and credit—that is, each incident of the cause of action must be enforced precisely as defined by the statute creating it—is not new. Indeed, it has been attacked as unsound by one of our leading scholars in the field of conflict of laws. Professor Currie has described it as a natural argument for someone "schooled in the assumption that the law of one and only one state must govern the whole of any transaction • • •." "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function", 26 U. Chi. L. Rev. 9, 63 (1958). That underlying assumption is inconsistent with the views expressed by the Supreme Court as long ago as 1934, when *Alaska Packers Ass'n.* v. *Industrial Accident Commission*, 294 U. S. 532, was decided. In that case the Court expressly recognized that rights asserted under the statute of one

---

[12] Much of the language in *Kilberg* classifying the maximum-liability provision as procedural might have appeared to some to be just such a subterfuge. But this language has since been disregarded by the New York Court of Appeals and *Kilberg* interpreted as an affirmation of a strong state public policy. See *Davenport* v. *Webb*, 11 N. Y. 2d 392 (1962).

state may necessarily be denied or qualified by the law of another.

> "The necessity (to decide the extent 'to which the statute of one state may qualify or deny rights asserted under the statute of another') is not any the less whether the statute and policy of the forum is set up as a defense to a suit brought under the foreign statute or the foreign statute is set up as a defense to a suit or proceedings under the local statute. In either case, the conflict is the same. In each, rights claimed under one statute prevail only by denying effect to the other. In both the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight." 294 U. S. at 547.

The decision we reach seems to be in keeping with a view of the Constitution as a primer of fundamental principles for the conduct of a developing federal system rather than a manual of technical rules. The Supreme Court was mindful of this when it recently pronounced

> "As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court has in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in

other states. *Watson* v. *Employers Liability Corp.*, 348 U. S. 66, 72 (1954).

We construe this as recognizing that a single "transaction" may contain within itself several distinct "issues" legitimately made subject to the law of more than one state.

True, New York reiterated its partial adherence to the rule of *lex loci delictus*. But does this require that New York be deprived of any power to apply a fundamental rule of public policy to one incident of the cause of action? New York has done nothing more than to apply a traditional choice-of-law rule which designates the law of Massachusetts as the source of liability for a wrongful death. It has absorbed the Massachusetts rule into the corpus of New York law for purposes of adjudicating this case fairly. See *Siegmann* v. *Meyer*, 100 F. 2d 367 (2d Cir. 1938); *Guinness* v. *Miller*, 291 Fed. 769 (S. D. N. Y. 1923) (L. Hand, J.), aff'd, 299 Fed. 538 (2d Cir. 1924), aff'd *sub nom. Hicks* v. *Guinness*, 269 U. S. 71 (1925); Cavers, "The Two 'Local Law' Theories," 63 Harv. L. Rev. 822 (1950); Cook, "The Logical and Legal Bases of the Conflict of Laws," 33 Yale L. J. 457 (1924). We believe that in doing so New York is not bound to model *all* of the rules governing this litigation in which it is conceded it has a legitimate interest, on Massachusetts law. We are convinced that New York may examine each issue in the litigation—the conduct which creates liability, the parties who may bring an action, the extent of liability, the period during which the liability may be sued upon, and in appropriate cases, matters of immunity, insurance procedure, etc.—and by weighing the contacts of various states with the transaction, New York may, without interfering with the Constitution, shape its rules controlling the litigation.

It is argued in the dissenting opinion that the decision we reach today will result in an unwarranted invasion by New York of Massachusetts' freedom of action, and that henceforth no state can legislate without incurring the risk that the courts of a sister state, having some contact with the transaction, will use its law to reach a result never intended by the legislators. We find these arguments unconvincing because they rest on a premise with a very dubious constitutional underpinning. We may concede that the Wrongful Death Statute of Massachusetts, almost certainly designed with an eye toward the regulation of occurrences transpiring wholly within Massachusetts, should be honored fully and completely when the incident under litigation is a local one. Such, we take it, is the import of *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930). But we cannot concede that Massachusetts has a constitutionally protected claim to the unqualified application of its statute in cases with an overwhelmingly interstate flavor.[13] The adoption of such a principle would effect an incursion by Massachusetts upon the public policy of New York far more serious than the purported incursion upon Massachusetts policy which we have upheld today.

[13] In the converse situation, Massachusetts courts have long utilized the public policy argument as a means of guarding Massachusetts interests in multistate transactions. See 307 F. 2d at 139, n. 8. The interstate flavor of modern air transportation is well described in the Kilberg case, 9 N. Y. 2d at 39, 211 N.Y.S. 2d at 135: "Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they [sic] move * * *. An air traveler from New York may in a flight of a few hours' duration pass through several * * * commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an airplane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous."

If Massachusetts local rules must, by constitutional compulsion, govern every aspect of a transaction so intimately affecting the interests of New York, then the concept of full faith and credit is being utilized as an extraordinary example of oppressiveness to legitimate and lawful state interests.

The constitutional assault upon the *Kilberg* principle has not been limited to the Full Faith and Credit Clause, however. We are likewise told that it violates the Due Process Clause of the Fourteenth Amendment.[14] In order that the latter clause be violated there must be some deprivation of life, liberty, or property. It is argued that our decision deprives the defendant of property. But to assert that Northeast Airlines is being deprived of its "property" is to assume the very point in issue, i.e., that Northeast is given some vested property right by the application of the Massachusetts rule of liability for wrongful death. This writer has already stated in his panel dissent that no such vested right exists. See 307 F. 2d 140-42.

This "deprivation of property" argument may also explain a purported distinction urged upon us, which is drawn between the case before us and some of the earlier Supreme Court cases, such as *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514 (1953). This distinction was expressed in the majority panel opinion in this case in this fashion:

> "In *Wells* the plaintiff was not deprived of all remedy; he could sue in any state where defendant could be found and which has a longer statute of limitations than Pennsylvania [the forum] or follows a different conflicts rule. In our case defendant had no choice as to the forum. If deprived of the protec-

[14] "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

> tion of the limitation imposed by the law which, as *Kilberg* recognizes, created the liability, he will be treated unjustly." 307 F. 2d at 135.

In short, it is argued that *Wells* merely closed off to the plaintiff the courts of one state, whereas *Kilberg* fastened upon the defendant an irrevocable liability. This theory, which draws a constitutional distinction between temporary inconvenience to the plaintiff and irremediable prejudice to the defendant falters in at least one serious respect. It assumes that the plaintiff will be free to step across state lines, serve the defendant, and start his suit all over again. This assumption is immediately prone to attack. The dismissal of the plaintiff's action may be an effective adjudication where there is no other forum in which suit may be brought.[15]

Furthermore, once conceded that the defendant is given no vested property right merely because his interstate activities result in tortious conduct in a state whose law happens to be favorable to him, then the distinction between the result in *Wells* and the result in *Kilberg* falls of its own weight. We must emphasize that we are not concerned here with the *wisdom* of New York's choice-of-law, but only with its *power* to choose as it did in *Kilberg*. The Supreme Court in *Wells* upheld the *power* of the forum to subordinate or replace "substantive" or "integral" parts of a foreign statute so as to relieve a defendant from liability enforceable under the foreign statute. But is

---

[15] Further, a dismissal on public-policy grounds treads the thin line between a judgment on the merits and a judgment without prejudice; should a second jurisdiction view it as a judgment on the merits, the plaintiff will be "irremediably prejudiced" there. This lends support to our contention, to be developed shortly, that the fact that an application of the forum's public policy favors one party rather than the other is constitutionally irrelevant.

the forum to be deprived of the constitutional power to deal with a statute in exactly the same manner when the only difference will be a favorable result to the plaintiff instead of the defendant? The Supreme Court has in fact held that a state may choose to ignore or to qualify *defenses* that arise under the laws of another state. *Watson* v. *Employers Liability Corp.*, 348 U. S. 66 (1954), held that the concern of Louisana for the protection of its residents was sufficient to empower it to hear in its courts a direct action against a nonresident insurance company, despite a no-action clause in a Massachusetts contract allegedly controlling the obligations of the insurer.

We therefore see no escape from the proposition we announce today, that a legitimately interested state may under the circumstances of this case, apply a firmly fixed and long existing policy of its own, although this would remove a defense provided by an "integral" provision of the locus' statute creating the cause of action. This Court, in *Bournias* v. *Atlantic Maritime Co.*, *supra*, in an opinion by then Circuit Judge Harlan, held that a District Court sitting in New York could refuse to apply the one-year Panamanian statute of limitations incorporated in the very statute creating the cause of action upon which the suit was brought. There, as here, part of a foreign statute was rejected so as to eliminate a *defense* to the suit and to enhance the liability; in *Bournias*, it was length of time, in this case it is dollar limit. Both adversely affected the defendant.[16] Just such a result was forecast in Justice

[16] An attempt might be made to distinguish *Bournias* on the Court's finding that the statutory period was not "specifically" built in so as to refer unmistakably to the cause of action in question. But in *Wells*, the Supreme Court said: "Differences based upon whether the foreign right was known to the common law or upon the arrangement of the code of the foreign state are too unsubstantial to form the basis for constitutional distinctions under the Full Faith and Credit Clause." 345 U. S. at 518.

Brandeis' dictum in *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 409 (1930): "It is true that a State may extend the time within which suit may be brought in its own courts * * *. And * * * the local statute of limitation may be applied to a right created in another jurisdiction even where the remedy in the latter is barred." It should be unquestioned at this late date that the law of the forum may under certain circumstances very seriously qualify or expand the rights or obligations created by the statute of a foreign state. Whether this works to the benefit of one party or the other is clearly irrelevant to the issue of full faith and credit; and we can find no reason for holding that it has any greater relevancy to the issue of due process.

A violation of the Due Process Clause of the Fourteenth Amendment requires not only that there be a deprivation of property—and we have found none here—but also some unreasonable or unreasoned imposition of liability. In the area of conflict of laws, the Due Process Clause prevents an arbitrary application of a state's jurisprudence to an out-of-state event. It is not disputed that New York would not be arbitrary if it selected its own law to apply to the *whole* of this controversy. How, then, can the selection become arbitrary and constitutionally prohibited when New York makes an even more intelligent and rational application of its own law to a particular *issue* in the litigation?[16a] Could there be any principle of conflict of laws more arbitrary than the one advanced on behalf of the defendant, that New York need not apply Massachusetts law at all but that once New York models its rule of liability on

---

[16a] For a lucid discussion of the need for deciding conflict of laws problems on the basis of the particular issues in dispute, see Cavers, "Re-Restating the Conflict of Laws: The Chapter on Contracts," Twentieth Century Comparative and Conflicts Law, 349, 357-58 (1961).

the Massachusetts law it abdicates all power to make a wise choice of law to govern the other incidents of the litigation. Just as we stated when dealing with the Full Faith and Credit Clause, the Due Process Clause if so construed would be destructive of legitimate and lawful state interests and lose meaning. There is no precedent which supports such a constitutional proposition and we are disinclined to stamp our approval on such dubious doctrine.

The field of conflict of laws, the most underdeveloped in our jurisprudence from a practical standpoint, is just now breaking loose from the ritualistic thinking of the last century. Recent opinions of the Supreme Court and the great wave of academic writing reinforce this trend of flexible and articulate selection of the laws governing multistate transactions.[17] The development will be still-born if we impose inflexible constitutional strictures in the name of national unity, restrictions which could not be repaired by state or federal legislation.[18]

Finally, we hold, for the reasons stated in this writer's original dissenting opinion, that Judge McGohey was right in instructing the jury that the measure of damages should be based not upon the degree of the defendant's culpability but upon the extent of pecuniary loss sustained by the dependents.[19] Moreover, as decided unanimously

---

[17] See *Richards* v. *United States*, 369 U. S. 1, 12-13 (1962).

[18] See Freund, "Chief Justice Stone & the Conflict of Laws," 59 Harv. L. Rev. 1210, 1235-36 (1946): "If the task of Conflict of Laws is to understand, harmonize, and weigh competing interests in multistate events, and if the desideratum of uniformity will be approached most satisfactorily by evolving rules that deliberately seek these objectives, then we seem to be hardly ready for a set of precepts imposed in the process of Supreme Court decision as fixed canons of constitutional law."

[19] See 307 F. 2d at 146-47.

by the original panel, and for the reasons stated there, the running of interest on the judgment should be determined by Massachusetts law.

The judgment below is affirmed, as reduced by the modification of the award for interest.

FRIENDLY, Circuit Judge, (with whom LUMBARD, Chief Judge, and MOORE, Circuit Judge, join), dissenting:

I find nothing in the Federal Constitution that would prevent the legislature of New York from amending its wrongful death act, Decedent Estate Law, §130 et seq., to include the death in a sister state of a New York resident travelling on a flight from New York on a ticket purchased in New York, or the courts of New York from now reading its wrongful death act to cover such a case. Whether any one of these "contacts" would alone warrant New York in thus applying its own wrongful death act and refusing any "faith and credit" to the "public acts" of the sister state, certainly the combination does. So far as concerns the issue here, *Alaska Packers Ass'n* v. *Industrial Acc. Comm'n*, 294 U. S. 532 (1935), and *Richards* v. *United States*, 369 U.S. 1, 15 (1962), indicate that but no more than that. I would agree also that New York is constitutionally free to overrule decisions that forbid or restrict the personal representatives of a party to a contract of carriage made in New York from suing, on the contract, for wrongful death wherever it may occur. Our brothers' fears as to the imposition of inflexible constitutional strictures on the development of choice of law rules are thus quite needless; the majority seems rather to be supporting itself with ghosts of its own conjuring.

It is common ground that New York has not followed any of the courses just outlined. All seven of the judges of the Court of Appeals in *Kilberg* repudiated an action *ex contractu*. The majority likewise disclaimed any idea that recovery might be had, in tort, under New York's wrongful death act. Chief Judge Desmond said, 9 N. Y. 2d 34, 40, 211 N. Y. S. 2d 133, 135-136 (1961), with entire clarity: "We will still require plaintiff to sue on the Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damage"—"We * * * refuse to apply that part of the Massachusetts law". Moreover, in a subsequent case involving a claim for wrongful death in a sister state, the Court of Appeals underlined what it had said in *Kilberg*. After stating "We there indicated that the courts of this State were free to award damages in excess of the amount limited by a foreign death statute under which the action was brought * * *", it applied a rule of the sister state disallowing pre-judgment interest despite the contrary direction of § 132 of the New York Decedent Estate Law. *Davenport v. Webb*, 11 N. Y. 2d 392, 230 N. Y. S. 2d 17, 19 (1962). New York under the *Kilberg* doctrine thus gives some faith and credit to the foreign wrongful death act. In *Kilberg* it enforced the Massachusetts statute, Ann. Laws Mass., c. 229, § 2, (as in effect in 1958) insofar as this decrees that "If the proprietor of a common carrier of passengers * * * by reason of his or its negligence or wilful, wanton or reckless act, or by reason of the unfitness or gross negligence or carelessness, or the wilful, wanton or reckless act, of his or its servants or agents, causes the death of a passenger, he or it shall be liable in damages * * *." But New York disregards the words immediately following: "in the sum of not less than two

thousand nor more than fifteen thousand dollars, to be assessed with reference to the degree of culpability of the defendant or of his or its servants or agents, and recovered and distributed as provided in section one, and to the use of the persons and in the proportions, therein specified." Although *Kilberg* did not provide the detail as to just what New York would supply in place of the excised language save only that there would be no limitation on the amount of recovery, our brothers fill the gap; they decide that in New York the amount of recovery under the Massachusetts Act is to be measured by the loss sustained by the dependents without regard to the degree of defendant's culpability. Appellant contends that the Full Faith and Credit Clause, Art. IV, § 1, and the Due Process Clause of the 14th Amendment forbid this.

A superficially attractive answer is that if New York could validly arrive at the *Kilberg* result on a theory of contract or through amendment or construction of its own wrongful death act, the Constitution does not demand a different conclusion because New York attains the same goal through excising or altering a provision of the Massachusetts Act. I say "superficially attractive" since the two processes differ not only conceptually—which may not be altogether unimportant in a legal system designed to maintain a certain degree of order among fifty states—but practically as well. Although the primary interest of the framers of the Constitution in the area of intergovernmental relations was doubtless to set boundaries between the new Federal Government and the states, they were concerned also with preventing encroachments by one state upon another. See *Ogden* v. *Saunders*, 12 Wheat. 213, 369 (1827). Madison characterized the Full Faith and Credit Clause as among those "which provide

for the harmony and proper intercourse among the States." The Federalist No. 42. Granted that whenever a New York court enters a judgment, it is enforcing New York "law", and that New York may often make the same rules that govern transactions within New York apply to events in a sister state, it does not follow that when New York looks to a statute of a sister state as the source of a claim enforceable in its courts, the Constitution allows it to decline, in the Supreme Court's words, "to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend[s]." *Tennessee Coal, Iron & R.R. Co.* v. *George*, 233 U. S. 354, 360 (1914); see *Order of United Commercial Travelers* v. *Wolfe*, 331 U. S. 586, 625 (1947).

An important reason why a forum state may not do this is that it thereby interferes with the proper freedom of action of the legislature of the sister state. The terms and conditions of a claim created by statute inevitably reflect the legislature's balancing of those considerations that favor and of those that oppose the imposition of liability. The legislature may be quite unwilling to create the claim on terms allowing it to be enforced without limit of amount as most common law rights can be, or for a period bounded only by statutes of limitations ordinarily applicable. The Full Faith and Credit Clause insures that, in making its choice, the legislature creating the claim need not have to weigh the risk that the courts of sister states looking to its "public acts" as a source of rights will disregard substantial conditions which it has imposed—a calculation that would involve variables so numerous and unpredictable as to preclude any intelligent choice. This consideration is inapplicable to instances

where the forum, looking solely to its own substantive law, wholly disregards that of the sister state, as the Supreme Court held permissible in *Alaska Packers*. There nothing turns on whether or not the lawmakers of the sister state have acted or how they have acted. True, conduct in the enacting state has been given consequences different from what the legislators of that state desired; but that is the inevitable result of the duplicate lawmaking jurisdiction that can never be wholly avoided even in our federal system—not of action taken by the legislators of the enacting state in the absence of which the forum would not impose liability at all. The increasing scope of statutory liabilities makes it particularly vital that lawmakers of one state should know that once a transitory right has been created by them, it will receive the uniform enforcement from other states which the Full Faith and Credit Clause contemplated, see *Hughes v. Fetter*, 341 U. S. 609, 612 (1951), compare *id.* fn. 10, and that they should not be obliged to speculate that other states may take what is liked and reject what is disliked—a prospect that might well discourage or prevent enactments otherwise deemed desirable.

The situation is not altered by the circumstance that we are here dealing with a wrongful death act. If the forum state may disregard limitations on recovery in one type of foreign statute to which it looks as a source of rights, at least when it has as many "contacts" as New York had here, I can see no basis in principle why it may not do so in every other, and the majority appears to hold that view. Indeed, the instant case is a peculiarly weak one for reliance on any special rule relating to wrongful death acts. The Massachusetts statute departs from the norm in its penal character. "[T]he Massachusetts acts are exactly what Lord Campbell's act is not." *Hudson v. Lynn &*

Boston R.R., 185 Mass. 510, 519, 71 N. E. 66, 70 (1904). "Their basic theory as to damages is punishment not compensation." *Porter* v. *Sorell*, 280 Mass. 457, —, 182, N. E. 837, 839 (1932). "The standard of liability under the Massachusetts Death Act is punitive—i.e. 'with reference to the degree' of culpability—not compensatory." *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U. S. 128, 132 (1956). Recovery is limited, to be sure, but there is a minimum also, which may be recovered without proof of pecuniary loss, *Beatty* v. *Fox*, 328 Mass. 216, 102 N. E. 2d 781 (1952), and, if th defendant be sufficiently culpable, the award may outrun the damages sustained, as, for example, in the death of an aged person or an infant. Whether *Kilberg* means that New York will enforce those provisions of the Massachusetts Act providing a larger recovery than New York would ordinarily allow or that New York will substitute a wholly new standard of liability and damages, as the district judge here thought, 199 F. Supp. 539, 540 (S. D. N. Y. 1961), a view which the majority adopts without explanation other than that in the original dissenting opinion,[1] the result is for New York to give the Massachusetts statute an application altogether different from what the framers of the latter intended. To allow that is, indeed, a strange way to "provide for the harmony and proper intercourse among the States" which the Full Faith and Credit Clause was intended to promote.

[1] This was that "the standard of culpability, by its total disregard for the injury actually sustained by the decedent's dependents, violates the primary purpose of most wrongful death legislation, including that of New York, which is concern for the pecuniary loss of the beneficiaries who remained behind." 307 F. 2d at 147. The primary purpose of the New York legislation, certainly, and of "most" wrongful death acts, probably, see 2 Harper & James, The Law of Torts, §24.2 at 1288 (1956), but clearly not of the Massachusetts Act to which New York here looks as the source of plaintiff's claim.

The *Kilberg* opinion justifies all this, and our brothers approve, on the basis that "It is open to us, particularly in view of our own strong public policy as to death action damages, to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies." 9 N. Y. 2d at 41-42, 211 N. Y. S. 2d at 137. It is true that the Full Faith and Credit Clause does not demand that, in enforcing a right given by statute of a sister state, the forum must abandon its own procedural rules. Thus the forum may and ordinarily will apply its own rules as to such matters as discovery, evidence and mode of trial; it would be free to give a jury trial although the foreign statute provided for trial to a judge, or vice versa, just as it may disregard venue limitations in the statute giving rise to the claim, *Tennessee Coal, Iron & R.R. Co.*, v. *George*, *supra*. When the foreign state has not made a period of limitations a qualification on the right, the forum may apply its own longer statute, *Bournias* v. *Atlantic Maritime Co.*, 220 F. 2d 152, 154-158 (2 Cir. 1955). Likewise the forum may enforce a statute of limitations shorter than what the enacting state has "built in" to the right; no state can require another to keep its courts open for the enforcement of a claim given by the former's law which the latter would not enforce if created solely by its own. *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514 (1953).[2] However, merely labeling a difference from the foreign law as "procedural" or "remedial" rather than substantive will not defeat application of the

[2] No case holds that the forum may constitutionally extend the period "where a statute creates a new liability, and in the same section or in the same act limits the time within which it can be enforced", *Davis* v. *Mills*, 194 U. S. 451, 454 (1904). In addition to the *Davis* case, *The Harrisburg*, 119 U. S. 199, 214 (1886), and *Bournias* v. *Atlantic Maritime Co.*, *supra*, indicate it may not do this when it is clear that the state creating the right meant the time limitation to be a condition on it and thus applicable generally.

Full Faith and Credit Clause, as *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936), clearly holds. Cf. *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487, 497-498 (1941).

Although, as the Court of Appeals indicated in *Kilberg*, there are cases where the issue "whether a given question is one of substance or procedure" may be doubtful, 9 N. Y. 2d at 41, 211 N. Y. S. 2d at 137, this is not one. That Massachusetts regards the limit as an essential part of the cause of action created by its legislature is clear beyond peradventure. Not only does the statute tie the words together as closely as possible, but the unique nature of the claim, with $2,000 payable regardless of the damages and with awards above that varying with the degree of culpability, makes it plain that the ceiling is as integral a part of the right as the floor. There is, moreover, other persuasive evidence of Massachusetts' legislative intent. Effective in 1959, the Massachusetts General Court rewrote the statute completely but declined to abolish either the "degree of culpability" standard or the limitation on the amount recoverable; instead it simply increased the maximum from $15,000 to $20,000. Ann. Laws Mass. c. 229, § 2 (Cum. Supp. 1961), Mass. Acts 1958, c. 238, § 1. Just last year the statute was again amended, effective Jan. 1, 1963, with the only change being the raising of the minimum recovery to $3,000 and the maximum to $30,000. Mass. Acts 1962, c. 306.[3] Common sense tells us that "The

[3] In making this change the legislature had before it, and explicitly disapproved, bills which would have removed the recovery ceiling altogether. See Legislative Record at 583, in Commonwealth of Massachusetts, General Court of 1962, Bulletin of Committee Work and Business of the Legislature (Final Ed. 1962 Sess.) (committee states that its recommendation of H. No. 3476, the bill which passed was based on consideration of three bills, two of which, H. No. 274 and H. No. 2964, would have abolished ceiling); Mass. Judicial Council, 37th Report 45-47 (1961) ("accepted" June 21, 1962) (adverse report on bill to eliminate ceiling).

size of a right is a part of the right," Leflar, Conflict of Laws (1959), § 65, at 118. A layman would, indeed, be astonished that anyone could characterize as "merely procedural" a rule of law which may increase a recovery from $15,000 to $160,000 or well beyond that, even though he could appreciate that a rule wholly defeating recovery because of untimeliness in bringing the action was. Until now the law in this area has not departed so far from the common understanding of men. The Supreme Court has said that "the question of the proper measure of damages is inseparably connected with the right of action * * *," *Chesapeake & Ohio Ry.* v. *Kelly*, 241 U. S. 485, 491 (1916), and this rule applies specifically with reference to claims for wrongful death. See *Northern Pac. R.R.* v. *Babcock*, 154 U. S. 190, 197-198 (1894); *Slater* v. *Mexican Nat'l. Ry.*, 194 U. S. 120 (1904); Goodrich, Conflict of Laws (3 ed. 1949), § 105; 15 A. L. R. 2d 762, 765 (1951). A limit on the amount of recovery on a statutory right bears no resemblance to those "limitations" * * * imposed to promote practicality, convenience, and the integrity of local practice" which, as this Court has said, are properly denominated "procedure". *Collins* v. *American Automobile Ins. Co.*, 230 F. 2d 416, 421-422 (2 Cir. 1956).

I find little force in a contention that the distinction between substance and procedure should not be given constitutional significance in the application of the Full Faith and Credit Clause. On the contrary, as was so clearly pointed out by Mr. Justice Brandeis in the *John Hancock* case, *supra*, blind acceptance of the characterizations made by state courts would be the surest way to undermine this constitutional guarantee. If the label affixed by the forum state were conclusive, New York could equally override the Massachusetts limit on recovery when

it did not have the contacts that it had in *Kilberg* or here. In this field of law also, there may be a "twilight zone", see *Sampson* v. *Channel*, 110 F. 2d 754, 756-757 (1 Cir.), cert. denied, 310 U. S. 650 (1940); *D'Onofrio Constr. Co.* v. *Recon Co.*, 255 F. 2d 904, 910 (1 Cir. 1958); *Iovino* v. *Waterson*, 274 F. 2d 41, 48 (2 Cir. 1959), cert. denied, 362 U. S. 949 (1960), where a determination by the forum state that a matter is procedural will be respected even though another court in its independent judgment would regard the issue as substantive. The survival of a claim against a deceased resident defendant, *Grant* v. *McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953), cited by the majority, may lie in this zone.[4] But the transformation of a penal or limited statutory liability into a compensatory and unlimited one goes far beyond the widest concept of "procedure" or "remedy". No one would suppose that Congress, simply by classifying its edict as "procedural", could constitutionally direct the Federal courts, in diversity actions, to disregard limitations on the amount of recovery in state wrongful death acts. If the mere label of "procedure" is thus inadequate to enlarge Federal power beyond constitu-

[4] *Haumschild* v. *Continental Cas. Co.*, 7 Wis. 2d 130, 95 N. W. 2d 814 (1959), also cited in the majority opinion, held that the forum would apply the law of the spouses' domicile, which allowed the action, rather than that of the place of accident, to determine whether one spouse had the right to sue another for tort; in view of the traditional recognition of the law of the domicile as governing marital relations, see *Emery* v. *Emery*, 45 Cal. 2d 421, 289 P. 2d 218 (1956), this decision is hardly pertinent. It should also be observed that both *Grant* and *Haumschild* related to common law claims where there was no indication that the state of the accident had the slightest interest in the course followed by another forum when the defense of death or of inter-spouse immunity of the actor was asserted as to one of the latter's residents; here it is apparent that the interest of the Massachusetts legislature in limiting what could be collected from a common carrier for death in that state was not confined to Massachusetts suits. In the *Grant* case Judge Traynor expressly distinguished statutory causes of action for wrongful death, 41 Cal. 2d 864-865, 264 P. 2d 947-948.

tional limitations, it is likewise inadequate to enable a state to hurdle the Full Faith and Credit Clause. See also *Levinson* v. *Deupree*, 345 U. S. 648, 651-652 (1953), and *The Tungus* v. *Skovgaard*, 358 U. S. 588, 592-593 (1959), dealing with "procedure" and "substance" in the application of state wrongful death acts to maritime claims.

There remains only to consider the contention that what New York has done is supported by *Watson* v. *Employers Liab. Assur. Corp.*, 348 U. S. 66 (1954). That case held that Louisiana could validly subject a liability insurance company which had contracted, outside Louisiana, to pay amounts awarded in judgments or settlements resulting from injuries in Louisiana, to a direct action by the injured person despite a contractual stipulation against such an action in advance of the judgment or settlement. Louisiana was thus permitted to impose upon insurers of risks within its borders a new liability, created by it, wholly independent of the contractual duty to the insured, see *Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U. S. 48, 51 (1954), and differing from the latter in many essential respects, see *Collins* v. *American Automobile Ins. Co.*, *supra*, 230 F. 2d at 419-422; Louisiana did not purport to be enforcing a "public act" of a foreign state and then altering it to suit its pleasure, as New York is doing here. The *Watson* decision might well be cited as sustaining the power of New York to make defendant's operations within its borders a basis for applying its own statute to deaths in the course of contracts made or flights commencing in New York; in no way does it uphold New York's invoking the Massachusetts Act as the source of the right and then transforming the right into one altogether different in nature and amount from what Massachusetts has decreed.

We would reverse the judgment of the District Court, as was done in the decision of the panel written by Judge Swan.

APPENDIX B

NEW YORK COURT OF APPEALS OPINIONS

IN

KILBERG v. NORTHEAST AIRLINES

9 N.Y.2d 34; 172 N.E.2d 526

AND

DAVENPORT v. WEBB

11 N.Y.2d 392; 183 N.E.2d 902

New York Court of Appeals Opinion in *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34

JACK KILBERG, as Administrator of the Estate of EDWARD J. KILBERG, Deceased, Appellant, *v.* NORTHEAST AIRLINES, INC., Respondent.

Argued October 12, 1960; decided January 12, 1961.

APPEAL from a judgment, entered April 15, 1960, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department which (1) reversed, on the law, an order of the Supreme Court at Special Term (ARTHUR MARKEWICH, *J.*), entered in New York County, denying a motion by defendant to dismiss the second cause of action in the complaint, and (2) granted the motion and directed that judgment be entered dismissing said second cause of action.

Lee S. Kreindler, *Leonard J. Fassler* and *Jay R. Handwerger* for appellant.

William J. Junkerman, *James B. McQuillan* and *Maurice L. Noyer* for respondent.

Chief Judge DESMOND. Defendant is a common carrier of passengers by air. Plaintiff's intestate, a passenger on one of defendant's planes, was killed in August, 1958 when the airship crashed and burned at Nantucket, Massachusetts, in the course of a flight from a New York airport. The complaint pleads three causes of action but this appeal has to do, immediately, with the second count only. That part of the complaint has been dismissed for insufficiency by the Appellate Division which reversed Special Term's denial of defendant's motion to dismiss. Plaintiff appeals here from the dismissal. We shall have occasion farther on in this opinion to discuss the first cause of action in which plaintiff sues under the Massachusetts wrongful death statute.

New York Court of Appeals Opinion in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

The disputed second cause of action alleges that plaintiff's intestate before boarding the plane at La Guardia Airport bought from defendant a ticket for transportation to Nantucket, that defendant by causing his death in the crash breached its contract to carry him safely and that as a result the passenger's estate and his dependent suffered substantial damages (stated as $150,000) for which his administrator sues and which include "loss of accumulations of prospective earnings of the deceased." There was in effect at the time of this disaster section 2 of chapter 229 of the General Statutes of Massachusetts which gave a cause of action against a common carrier for negligently causing a passenger's death but limited to not less than $2,000 or more than $15,000 the damages to be awarded therefor. Special Term, citing *Dyke* v. *Erie Ry. Co.* (45 N. Y. 113) and other authorities, held that plaintiff could sue in contract and that the law of New York, the place of contract, governed such a cause of action and not the law of Massachusetts, the place of the wrong. The Appellate Division, considering the *Dyke* decision inapplicable, took the position that the second cause of action, however labeled or phrased, is in tort for negligently causing death and as such is subject to the damage limitation of the Massachusetts wrongful death statute.

Plaintiff's submission as to this second count is that it sounds in contract and so is governed for all purposes by the law of New York, the place of contract. If the alleged contract breach had caused injuries not resulting in death, a New York-governed contract suit would, we will assume, be available (*Dyke* v. *Erie Ry. Co.*, 45 N. Y. 113, 117, *supra*; *Busch* v. *Interborough R. T. Co.*, 187 N. Y. 388; *Fish* v. *Delaware, L. & W. R. R. Co.*, 211 N. Y. 374, app. dsmd. 245 U. S. 675; Restatement, Conflict of Laws, §337).

New York Court of Appeals Opinion in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

But "it is law long settled that wrongful death actions, being unknown to the common law, derive from statutes only and that the statute which governs such an action is that of the place of the wrong" (*Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465; *Baldwin* v. *Powell*, 294 N.Y. 130). Language found in the old case of *Doedt* v. *Wiswall* (15 How. Prac. 128, 141, affd. 15 How. Prac. 145) cannot be used to overrule so basic a rule. It follows, as the Appellate Division correctly held here, that plaintiff as administrator has no separate right to sue this carrier in contract for causing his intestate's death (*Webber* v. *Herkimer & Mohawk St. R. R. Co.*, 109 N. Y. 311), that the cause of action for injuries did not survive (*Bernstein* v. *Queens County Jockey Club*, 222 App. Div. 191, and cases cited therein), and that the second cause of action had to be dismissed.

That does not mean, however, that for this alleged wrong plaintiff cannot possibly recover more than the $15,000 maximum specified in the Massachusetts act. Modern conditions make it unjust and anomalous to subject the traveling citizen of this State to the varying laws of other States through and over which they move. The number of States limiting death case damages has become smaller over the years but there are still 14 of them (compare the list in Tiffany, Death by Wrongful Act [1st ed., 1893], p. xvii, with the data found in Martindale-Hubbell Law Digests, 1960 ed., Vol. IV). An air traveler from New York may in a flight of a few hours' duration pass through several of those commonwealths. His plane may meet with disaster in a State he never intended to cross but into which the plane has flown because of bad weather or other unexpected developments, or an air-

plane's catastrophic descent may begin in one State and end in another. The place of injury becomes entirely fortuitous. Our courts should if possible provide protection for our own State's people against unfair and anachronistic treatment of the lawsuits which result from these disasters. There is available, we find, a way of accomplishing this conformably to our State's public policy and without doing violence to the accepted pattern of conflict of law rules.

Since both Massachusetts (General Statutes, ch. 229, §§ 1, 2, as in effect in Sept. 1958) and New York (Decedent Estate Law, § 130) authorize wrongful death suits against common carriers, the only controversy is as to amount of damages recoverable. New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old. Since the Constitution of 1894, our basic law has been (N. Y. Const., art. I, § 16; N. Y. Const. [1894], art. I, § 18) that "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation." Each later revision of the State Constitution has included this same prohibition against limitations of death action damages. The reasons for its adoption are set forth in the proceedings of the 1894 Constitutional Convention (see discussion in Lincoln's Constitutional History of New York, Vol. III, pp. 57-65, and in *Medinger* v. *Brooklyn Heights R. R. Co.*, 6 App. Div. 42 [1896]). New York's original wrongful death law (L. 1847, ch. 450), passed very soon after Lord Campbell's Act became law in Great Britain, had like the latter no restriction as to damages. The Legislature later imposed such limits but the convention which drew the

1894 Constitution rejected and forbade them. "The argument which evidently controlled the convention in its action consisted of the claim that the arbitrary limitation was absurd and unjust in measuring the pecuniary values of all lives to the next of kin by the same arbitrary standard" (Justice HATCH in *Medinger* opinion, *supra*, p. 46). The absurdity and injustice have become increasingly apparent in the six decades that have followed. For our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law (see *Mertz* v. *Mertz*, 271 N. Y. 466, 471; *Shannon* v. *Irving Trust Co.*, 275 N. Y. 95, 102, 103). The Massachusetts cases likewise say that Massachusetts will enforce the *lex loci delicti* in wrongful death suits unless Massachusetts public policy forbids (see *Higgins* v. *Central New England R. R. Co.*, 155 Mass. 176; *Jackson* v. *Anthony*, 282 Mass. 540, 545, 547).

An illustration of our readiness to reject such arbitrary limitations, on public policy grounds, is *Conklin* v. *Canadian-Colonial Airways* (266 N. Y. 244). In the *Conklin* suit plaintiff's intestate had purchased in Albany a plane ticket to Newark, New Jersey, which on its face limited to $5,000 defendant's liability for negligently causing a passenger's death. That limitation, just like the limitation here in question, was contrary to New York's public policy but valid in New Jersey which was the place of the plane disaster and of defendant's alleged wrongdoing. The public policy which allowed us to strike down the contractual limitation in Conklin's case has no less effect here. We will still require plaintiff to sue on the Massachusetts statute but we refuse on public policy grounds to enforce one of its provisions as to damages.

New York Court of Appeals Opinion in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

Actually, we have in *Wooden* v. *Western N. Y. & Pa. R. R. Co.* (126 N. Y. 10, 16–17) a flat holding by our court that, in an action brought for causing a wrongful death in Pennsylvania, the New York courts would enforce our limitation of damages (as it then existed) although Pennsylvania had no such limitation. The reason, equally pertinent here, is that the "restriction pertains to the remedy rather than the right" (p. 16) and "does not strictly affect the rule of damages, but rather the extent of damages, and that extent, as limited or unlimited, does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted." *Loucks* v. *Standard Oil Co.* (224 N. Y. 99) does not overrule *Wooden* (*supra*). Looking at the true holding of the *Loucks* case (*supra*) rather than picking out language from the opinion, we find that the court was merely deciding that the minimum set for recovery in the Massachusetts wrongful death statute did not make it a "penal statute" unenforcible here because contrary to our public policy (see Chief Judge Cardozo's reference to *Loucks* in *Wikoff* v. *Hirschel*, 258 N. Y. 28, 30).

As to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies (*Franklin Sugar Refining Co.* v. *Lipowicz*, 247 N. Y. 465, 468; *Russell* v. *Societe Anonyme*, 268 N. Y. 173, 181). However, as Professor Leflar says (Conflict of Laws, § 60), remedial and substantive "shade into each other constantly" and "the law of the forum normally determines for itself" whether a given question is one of substance or procedure. This is the conventional approach and was the one used in the only New York appellate decision on the subject (*Murray* v. *New York, O. & W.*

R. R. Co., 242 App. Div. 374; see *Collins* v. *American Auto. Ins. Co.*, 230 F. 2d 416, 422; 32 N. Y. U. L. Rev. 786; Restatement, Conflict of Laws, § 584). As to whether the measure of damages should be treated as a procedural or a substantive matter in wrongful death cases, there is authority both ways (see, for instance, *Walton School of Commerce* v. *Stroud*, 248 Mich. 85) and no controlling New York decision except the statements quoted in an earlier paragraph of this opinion from the *Wooden* decision (126 N. Y. 10, 17, *supra*). It is open to us, therefore, particularly in view of our own strong public policy as to death action damages, to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies.

Some of the older Federal cases (see *Northern Pacific R. R. Co.* v. *Babcock*, 154 U. S. 190; *Slater* v. *Mexican Nat. R. R. Co.*, 194 U. S. 120, 126) gave defendants the benefits of limitations of damages found in the law of the place of wrong, regardless of where the actions were brought. Those cases, however, are not binding on us and do not bring into play the full faith and credit clause of the Constitution (see *Wells* v. *Simonds Abrasive Co.*, 345 U. S. 514). We think that time has proven the wisdom and practicality of the *Slater* case dissent, which adopted the rule of *Wooden* v. *Western N. Y. & Pa. R. R. Co.* (*supra*).

From all of this it follows that while plaintiff's second or contract cause of action is demurrable, his first count declaring under the Massachusetts wrongful death action is not only sustainable but can be enforced, if the proof so justifies, without regard to the $15,000 limit. Plaintiff, therefore, may apply if he be so advised for leave to amend his first cause of action accordingly.

Concurring Opinion per Fuld, J. in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

The judgment appealed from should be affirmed, with costs.

FULD, J. (concurring). I, too, believe that the judgment dismissing the contract cause of action alleged in the second count of the complaint should be affirmed. However, having made that determination, I would go no further.

To expatiate on this, I would say that, while I agree that the second count—the only one before us—fails to state a cause of action, I find no warrant or justification for going beyond that single issue and considering, *sua sponte*, questions which underlie the complaint's first count alleging a cause of action for wrongful death under the Massachusetts statute. I do not mean to suggest that, in passing upon a case, a court is confined to the authorities furnished or the arguments advanced by counsel, for I deem it clear that, within certain limits, a court is free to reach a decision concerning the issue posed on any ground available. (See, e.g., *Rentways, Inc.*, v. *O'Neill Milk & Cream Co.*, 308 N. Y. 342, 349.) But, as I have already indicated, this does not entitle a court to discuss or decide an issue which not only is not argued by the parties, but actually is not raised or presented by the record.

In this case, the court is called upon to decide only the sufficiency of the second cause of action, sounding in contract, and, quite obviously, whether the monetary limitation specified in the Massachusetts wrongful death statute may be disregarded has nothing whatsoever to do with that decision. Consequently, I feel constrained to limit my discussion to the validity of the contract cause of action. Decision or the question whether the maximum prescribed by the Massachusetts statute measures the amount which the plaintiff may recover on his first cause

of action should await an appeal where that issue is presented and the parties have had an opportunity of briefing and arguing it.

As to the question before us, the sufficiency of the contract cause of action, one might well begin by noting that in *Baker* v. *Bolton*, 1 Camp. 493), decided in 1808, Lord Ellenborough declared, by way of dictum, that, "In a civil court, the death of a human being could not be complained of as an injury". Learned authors attacked the rule thus announced as "obviously unjust"—it had as its consequence that "it was more profitable for the defendant to kill the plaintiff than to scratch him" (Prosser, Torts [2d ed., 1955], p. 710)—and as being "based upon a misreading of legal history". (3 Holdsworth, History of English Law [3d ed., 1923], p. 336; see, also, Salmond, Torts [12th ed., 1957], p. 625; Winfield, Death as Affecting Liability in Tort, 29 Col. L. Rev. 239, 252-253). Nevertheless, harsh and anomalous though it was, the rule prevailed in England and in this country until the enactment of wrongful death statutes. (See 2 Harper and James, The Law of Torts [1956], pp. 1284-1285; Prosser, *op. cit.*, pp. 709-710; Salmond, *op. cit.*, pp. 623-625.)

Although it appears that in England, even before enactment in 1846 of the wrongful death statute known as Lord Campbell's Act, it had been held that, "where death is caused by the breach of a carrier's implied contract for safe carriage, the executor or administrator, although he could not sue in tort, [could] sue in contract, and recover damages suffered by the decedent's estate" (Tiffany, Death by Wrongful Act [2d ed., 1913], p. 21; see, also, Salmond, *op. cit.*, p. 624), no such exception seems to

have been recognized in the United States. In fact, in New York, this English exception for wrongful death arising out of a breach of contract of safe carriage was disavowed in this court as early as 1866 in the case of *Green* v. *Hudson Riv. R. R. Co.* (2 Keyes 294; 2 Abb. Ct. App. 277, affg. 28 Barb. 9), where the complaint alleged "that the deceased became a passenger on a train from Albany to New York, under the usual engagement to be safely carried, and that by the gross carelessness and unskillfulness of the defendant's agents, a collision occurred, by means of which the said [passenger] was then and there killed" (28 Barb. 9, 14). Although the rule was acknowledged to be "harsh or narrow" (2 Keyes, at p. 303, 2 Abb. Ct. App., at p. 286), the court, nevertheless, denied recovery and concluded that "It is sufficient that the rule is settled so firmly that courts would travel beyond their province into the boundaries of legislation by any attempt to alter it, or to create, by their decision, causes of action not before known" (2 Keyes, at p. 295; 2 Abb. Ct. App., at p. 279; see also, *Duncan* v. *St. Luke's Hosp.*, 113 App. Div. 68, affd. 192 N. Y. 580).

Thus, whatever may have been the English rule as to recovery for death arising out of a breach of contract of safe carriage, in New York, at least, there was no recovery at common law. The question arises, then, whether, following enactment of a wrongful death statute in this State, an action could be brought on contract for damages for death resulting from the breach of a carrier's agreement. The answer seems to be in the affirmative where the wrongful act causing death, as well as the agreement, occurred in this State. (See *Doedt* v. *Wiswall*, 15 How. Prac. 128, affd. 15 How. Prac. 145; cf. *Greco* v.

Kresge Co., 277 N. Y. 26, 34, citing the *Doedt* case with approval; *Roche v. St. John's Riverside Hosp.*, 96 Misc. 289, affd. 176 App. Div. 885; *Keiper* v. *Anderson*, 138 Minn. 392.)[1] This, though, does not resolve the problem presented by the case before us, where, although the agreement of safe carriage was made in New York, the wrongful act causing death occurred elsewhere.

If this were a matter of first impression, it might be effectively argued that, where "two or more communities are touched or affected by a factual sequence", the "guide to the governing law" should be the jurisdiction having "the most significant contact or contacts" (Harper, Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays, 56 Yale L. J. 1155, 1161). And, since the contract of safe carriage was undertaken in New York and since this fact provides a more "significant contact" than the adventitious occurrence of the crash in Massachusetts, it might well be further urged, this State's wrongful death statute and not that of Massachusetts should apply.

Impressed though I am by the theoretical soundness of such a position, I am forced to the conclusion that it is foreclosed by our decisions. In *Crowly* v. *Panama R. R. Co.* (30 Barb. 99), which presents a fact pattern not unlike that in this case, the plaintiff's intestate had entered into

[1] In the *Greco* case (277 N. Y. 26, *supra*), this court unequivocally approved the *Doedt* case, stating significantly (p. 34): "Nor is an action any the less on contract because the elements of damage arise out of a trespass (*Sullivan* v. *Dunham*, 161 N. Y. 290), or an assault (*Busch* v. *Interborough R. T. Co.*, *supra*) or other personal injury (*Doedt* v. *Wiswall*, 15 How. Pr. 128; affd., 15 How. Pr. 145; *Gillespie* v. *Brooklyn Heights R. R. Co.*, 178 N. Y. 347). Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act."

a contract of safe carriage in New York and was killed as the result of acts of negligence of the carriers in Panama. Although Panama had no wrongful death statute at the time, New York did, and the plaintiff attempted to bring himself under that statute by arguing that "the contract was made, and the fare paid, in this state" (30 Barb., at p. 109). The court rejected this argument and dismissed the complaint. Not only has the *Crowly* decision been cited with approval by this court (e.g., *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 48, 53; *McDonald* v. *Mallory*, 77 N. Y. 546, 550; *Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465, 475), but we have categorically declared, and quite recently, that our wrongful death statute (Decedent Estate Law, § 130) "applies *only* to actions brought for damages for a wrong committed here causing the death of a person" and is to be given no extra-territorial effect in cases where injury and death occur outside of the State. (*Baldwin* v. *Powell*, 294 N. Y. 130, 132; see, also, *Debevoise* v. *New York, L. E. & W. R. R. Co.*, 98 N. Y. 377, 379; *McDonald* v. *Mallory*, 77 N. Y. 546, 550, *supra*).

Nor does section 116 of the Decedent Estate Law, upon which the plaintiff relies, give him a right to sue in contract for his intestate's allegedly wrongful death. That statute, simply declaring that "actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators", creates no new rights or liabilities. Since, as is apparent, plaintiff's intestate could not have maintained the cause of action alleged in the second count, there was no right of action to survive his death.

Concurring Opinion per Froessel, J. in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

In sum, then, limiting consideration to the only matter before us, it is my conclusion that no action *ex contractu* is available to the plaintiff under either the common law of New York or its wrongful death statute and that, therefore, the Appellate Division properly granted the defendant's motion to dismiss the second cause of action.

FROESSEL, J. (concurring). We concur for affirmance of the judgment appealed from, dismissing plaintiff's second cause of action. We should reach no other question. In this case, defendant moved to dismiss the *second* cause of action for legal insufficiency, and nothing more; the subsequent notices of appeal were limited accordingly. Special Term denied the motion. The Appellate Division unanimously reversed and granted the motion, properly stating that it was "not concerned here with the causes of action for wrongful death and conscious pain and suffering". We think the court below was entirely correct.

Although the *first* cause of action is not before us, and it has not been argued or passed upon by the courts below, the majority of this court is now reaching out to consider that cause of action, without application of any kind with respect thereto on the part of anyone. It is exercising discretion usually exercised by the courts below, as to a cause of action not properly before us, and granting plaintiff leave to apply for amendment of that cause of action on the assumption that plaintiff's intestate was a resident of this State at the time of his death. This procedure is not only unprecedented, but extends beyond our province.

Moreover, the court is laying down a new rule of law whereby we disregard the Massachusetts limitation as to damages in a wrongful death action, thereby undermining

the accepted pattern of conflict of law rules, in effect overruling numerous decisions of this court, and completely disregarding the overwhelming weight of authority in this country.

It has long been recognized as the law of this State that the right to maintain an action for wrongful death is dependent upon the existence of a statute creating such a right at the place where the injury resulting in death occurred (*Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465, 482; *Baldwin* v. *Powell*, 294 N. Y. 130, 132; *Royal Ind. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 272 App. Div. 246, 250, affd. 297 N. Y. 619). Equally well settled is the proposition that our own statute creating such a cause of action (Decedent Estate Law, § 130) is not to be given extraterritorial effect in cases where the wrongful death occurred outside of this State (*Debevoise* v. *New-York, L. E. & W. R. R. Co.*, 98 N. Y. 377; *Baldwin* v. *Powell, supra*; *Royal Ind. Co.* v. *Atchison, T. & S. F. Ry. Co., supra*).

Plaintiff's right to maintain this action must therefore stem from the provisions of the Massachusetts statute (Mass. Gen. Stats., ch. 229, § 2). That statute, however, expressly limits the extent of the right given, and declares that the damages assessed thereunder shall not be more than $15,000. In effect, this is tantamount to providing that there shall be no cause of action for wrongful death beyond this amount. The majority, by giving extraterritorial effect to our prohibition against the limitation of recovery in such actions, would permit plaintiff to recover on the basis of the foreign law, and yet not be bound by its express limitation. Such action was vigorously condemned by the Supreme Court of the United States in *Slater* v. *Mexican Nat. R. R. Co.* (194 U. S. 120, 126)

where Mr. Justice HOLMES, writing for the court, stated: "It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose." This was reaffirmed in *Western Union Tel. Co.* v. *Brown* (234 U. S. 542, 547) and *Black Diamond* v. *Stewart & Sons* (336 U. S. 386, 395-396 [1948]).

No sound reason appears why our courts, in enforcing such a right at all, should not enforce it in its entirety. This court has no power to determine what the public policy of Massachusetts should be (*Coster* v. *Coster*, 289 N. Y. 438, 443), and we may not ignore foreign law affecting the substantive rights of the parties merely because such law differs from our own (*id.*, at p. 442).

In *Loucks* v. *Standard Oil Co.* (224 N. Y. 99, 111), although it was suggested that our courts might refuse to enforce a right based upon a foreign statute "that outrages the public policy of New York", this court held that a Massachusetts act, very similar to the one with which we are now confronted, must be enforced—despite the fact that we "cannot give them the same judgment that our law would give if the wrong had been done here" (224 N. Y., at pp. 111-112). Thus Judge CARDOZO in his opinion clearly indicated that the maximum damages would be controlled by the Massachusetts statute.

In *Royal Ind. Co.* v. *Atchison, T. & S. F. Ry. Co.* (272 App. Div. 246, 250, affd. 297 N. Y. 619, *supra*), where our court refused to apply New York law as to additional liability, it was held to be "well established that a cause of action for wrongful death and *the extent of the damage recoverable* is governed by the laws of the place where

the injuries causing death were inflicted" (emphasis supplied).

As long ago as *Whitford* v. *Panama R. R. Co.* (23 N. Y. 465, 481-482, *supra*) this court adopted as "eminently sound and concl sive" the discussion of the precise question now before us by Mr. Justice WOODRUFF in *Whitford* v. *Panama R. R. Co.* (3 Bosw. 67, 83) where it was stated (23 N. Y. 482): "'Let it be supposed that New Granada has by law * * * prescribed the cases in which the defendants should be liable for a death caused by the negligence of their servants, *and the extent of that liability.* It would not, we think, be gravely insisted, that they use their railroad under any other or greater responsibility than is so prescribed.'" (Emphasis supplied.)

This court has repeatedly affirmed decisions bel w, which held that, in a wrongful death action based a foreign statute, interest shall not be allowed upon the amount of recovery from the time of death when the foreign statute contained no provision therefor (*Kiefer* v. *Grand Trunk Ry. Co.*, 12 App. Div. 28, affd. on opinion below 153 N. Y. 688; *Wyman* v. *Pan Amer. Airways*, 181 Misc. 963, affd. 267 App. Div. 947, affd. 293 N. Y. 878; *Colliton* v. *United Shipyards*, 256 App. Div. 923, affd. 281 N. Y. 582). The principle involved in these cases is the same as that involved in the case at bar. Since we refuse to allow interest (although our own statute requires it as part of the amount of recovery [Decedent Estate Law, § 132]) when no provision is made therefor in the law of the place of death, that same policy requires that no greater damages shall be allowed than are there provided. The "right to interest is inseparable from the right to damages" (*Kiefer* v. *Grand Trunk Ry. Co.*, 12 App. Div. 28, 32, *supra*).

Concurring Opinion per Froessel, J. in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

This court has also held, in an action for conversion, that the amount of damages recoverable must be governed by the law of the State where the loss was occasioned and not by our law (*Hasbrouck* v. *New York Cent. & H. R. R. R. Co.*, 202 N. Y. 363, 377).

The views here expressed have also been recognized as the law of New York by the Federal courts sitting in this State. In *Maynard* v. *Eastern Air Lines* (178 F. 2d 139 [2d Cir.]) the court submitted the issue of negligence to the jury with instructions that the recovery could not exceed $20,000, the limitation imposed by the terms of the Connecticut death statute, the State where the accident occurred. On appeal, the Court of Appeals for the Second Circuit affirmed, holding that according to the law of New York the Connecticut law with its limitation of damages was applicable.

In our opinion, these precedents are conclusive, and may not be disregarded without being overruled. The principle which they affirm is clearly the well-established law of this State.

Although we recognize that decisions from other jurisdictions are not controlling, it should be noted that the overwhelming weight of judicial authority in the United States is in accord with the view that the law of the place of injury governs not only the existence of the cause of action for wrongful death, but also the measure of damages (see cases collected in 15 A. L. R. 2d 765-766; 25 C. J. S., Death, § 28, p. 1101; Goodrich, Conflict of Laws, § 105; Restatement, Conflict of Laws, §§ 391, 412, 417; Leflar, Conflict of Laws, § 114). While Professor Leflar does note (§ 60, p. 109) that the procedural and substantive law "shade into each other constantly", he clearly states, in the

Concurring Opinion per Froessel, J. in Kilberg v. Northeast Airlines, 9 N.Y. 2d 34

same chapter, that "The size of the right is a part of the right" and that, therefore, the "measure of damages should be treated as a substantive rather than a procedural matter, and that the amount of the award should be determined by the rules of law of the place of the tort * * * rather than by the rules of the forum, as such. There is some authority the other way, treating measure of damages as procedure merely, on the idea that it does not constitute the right but only the remedy given in substitution for the right. This carries a nice theory to a point at which it conflicts with common understanding." (Ledar, Conflict of Laws, § 65, p. 118.)

The notewriter in 15 A. L. R. 2d cites 25 jurisdictions in this country in support of that majority view, and but 4 for the proposition that the amount of damages is governed by the law of the forum. Two of the latter jurisdictions, Massachusetts (*Higgins* v. *Central New England & W. R. R. Co.*, 155 Mass. 176) and New York (*Wooden* v. *Western N. Y. & Pa. R. R. Co.*, 126 N. Y. 10), no longer adhere to that view and have joined the ranks of the majority (see *Jackson* v. *Anthony*, 282 Mass. 540, 546-547, for an express rejection of the *Higgins* decision; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, *supra*, and the other cases referred to earlier in this opinion for a rejection of the *Wooden dicta*. That *dicta* mistakenly relied on *Dennick* v. *Central R. R. of N. J.*, 103 U. S. 11, which, in speaking of the remedy, merely decided that a New York administratrix may sue for a wrongful death in New Jersey; it in nowise held that damages might be treated as a procedural or remedial question).

Furthermore, questions relating to such defenses as contributory (comparative) negligence (*Fitzpatrick* v. *Inter-*

national Ry. Co., 252 N. Y. 127), charitable immunity (*Kaufman v. American Youth Hostels*, 5 N Y 2d 1016), incapacity of wife to sue (*Coster v. Coster*, 289 N. Y. 438, *supra*) and the Statute of Limitations (*Lipton v. Lockheed Aircraft Corp.*, 307 N. Y. 775) have all been regarded by this court as regulated by the law of the place of the injury rather than our own law, since they involve the substantial rights of the parties. In each of these cases we applied a foreign rule of law, although such rule was clearly contrary to the law of our own State, and we applied it whether it benefited the plaintiff or the defendant. In our opinion, the defense raised in the case at bar must be treated in the same manner—viz., by applying the law of Massachusetts, the place of death.

The majority would apply our own law of damages because the place of injury is entirely fortuitous. The same argument may be made with respect to each of the cases just referred to. We should not overrule well-established principles, nor "refuse to enforce a foreign right" at our pleasure, to suit our "individual notion of expediency or fairness" (*Loucks v. Standard Oil Co.*, 224 N. Y. 99, 111, *supra*).

The position adopted by the majority may result in the situation where, in a single airplane crash in which numerous passengers from various States are killed, a different law will be applied in each action resulting therefrom. The courts of each State, if they followed the majority view, would then apply their own law of damages to the case. As Judge Cardozo pointed out in the *Loucks* case (*supra*), "The theory of the statute personal, a body of national law which the citizen carries about with him * * * is a theory which has yielded generally in this country to

the principles of the territorial system and the doctrine of vested rights" (224 N. Y., *supra*, at p. 109). We should not attempt to revive it now.

The case of *Conklin* v. *Canadian-Colonial Airways* (266 N. Y. 244) has no applicability to the question before us. That case involved the validity of a *contractual* limitation upon a carrier's common-law liability. In the instant case, not only is the limitation imposed by statute rather than by contract, but, as we have seen, there was no underlying common-law liability.

Finally, we have grave doubts as to the constitutionality of the majority view in light of the decision of the Supreme Court of the United States in *Hughes* v. *Fetter* (341 U. S. 609) and section 1738 of title 28 of the United States Code, the implementing statute under the full faith and credit clause of the United States Constitution (art. IV, § 1), which provides that full faith and credit be accorded to the acts of the Legislature of any State.

Accordingly, the judgment appealed from dismissing plaintiff's second cause of action should be affirmed, with costs.

Judges Dye, Burke and Foster concur with Chief Judge Desmond; Judge Fuld concurs in result in a separate opinion; Judge Froessel concurs for affirmance in a separate opinion in which Judge Van Voorhis concurs.

Judgement affirmed.

New York Court of Appeals Opinion in *Davenport* v. *Webb*, 11 N.Y. 2d 392

JAMES DAVENPORT, as Administrator of the Estate of PAULINE DAVENPORT, Deceased, et al., Appellants, *v.* J. C. WEBB, SR., Doing Business under the Name of WEBB'S TRANSFER, et al., Respondents, et al., Defendant.

Argued May 16, 1962; decided June 12, 1962.

APPEAL from a judgment, entered April 3, 1962, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court in favor of plaintiffs, entered in New York County upon a verdict rendered at a Special and Trial Term (ARTHUR G. KLEIN, J.), which judgment was amended by an order of said court, entered in said county, directing the addition of interest to the verdicts from the date of death of decedents. The modification by the Appellate Division consisted of striking out the items of such interest.

Bennett E. Aron, *Samuel Pivar* and *Harry Zeitlan* for appellants.

William L. Shumate for respondents.

DYE, J. Section 132 of our Decedent Estate Law provides that, "When final judgment for the plaintiff is rendered" in a wrongful death action, "the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment".

The issue presented on this appeal is whether that provision applies to an action brought in New York but based on a wrong committed elsewhere, in other words, whether

the addition of prejudgment interest is to be governed by *lexi fori* or by *lex loci delictus*. The deaths in this case resulted from an automobile collision which occurred in Maryland; the decedents were residents of New York. Neither Maryland's wrongful death statute nor that State's case law authorizes the addition of prejudgment interest.

These actions resulted in a verdict and judgment for plaintiffs, which judgment was subsequently amended, on motion, to include interest from the date of death, on the authority of *Kilberg* v. *Northeast Airlines* (9 N Y 2d 34). Upon appeal, the Appellate Division unanimously modified the judgment by striking the addition of interest.

The overwhelming weight of authority, recognizing that "the question of the proper measure of damages is inseparably connected with the right of action" (*Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 491), has long held that the measure of damages for a tort is to be treated as a matter of substance, governed by the law of the place where the wrong occurred (see Leflar, Conflict of Laws, § 65; 2 Beale, Conflict of Laws, §412.2; Goodrich, Conflict of Laws [3d ed.], § 91, p. 254; 2 Rabel, Conflict of Laws: A Comparative Study [2d ed.], ch. 25, pp. 276-277). This has been particularly true in the area of wrongful death actions. Such actions did not exist at common law; they are creatures of statute (see *Debevoise* v. *New York, L. E. & W. R. R. Co.*, 98 N. Y. 377). Therefore, as we said on another occasion, "Right and remedy coalesced" and are "united" (*Matter of Berkowitz* v. *Arbib & Houlberg*, 230 N. Y. 261, 272).

In New York, the prejudgment interest in a wrongful death action is "part of the damages" (*Cleghorn* v. *Ocean Acc. & Guar. Corp.*, 244 N Y. 166, 167), the addition of which is governed by recourse to the usual conflicts of law

rules, which we have consistently applied by not adding interest to the judgment unless *lex loci delictus* authorizes such an addition (*Marmann* v. *New York, N. H. & H. R. R. Co.*, 258 N. Y. 447; *Monkwall* v. *Turbine Eng. Corp.*, 276 App. Div. 866, affd. 301 N. Y. 521; *Colliton* v. *United Shipyards*, 256 App. Div. 923, affd. 281 N. Y. 582; *Wyman* v. *Pan American Airways*, 181 Misc. 963, affd. 267 App. Div. 947, affd. 293 N. Y. 878; *Fraunfelker* v. *Delaware, L. & W. R. R. Co.*, 73 App. Div. 350; *Kiefer* v. *Grand Trunk Ry. Co.*, 12 App. Div. 28, affd. on opinion below 153 N. Y. 688). The Federal courts, operating under the doctrine of *Klaxon Co.* v. *Stentor Elec. Mfg. Co.* (313 U. S. 487), have followed suit (*Frasier* v. *Public Serv. Interstate Transp. Co.*, 254 F. 2d 132 [2d Cir.]; *Maynard* v. *Eastern Air Lines*, 178 F. 2d 139 [2d Cir.]; *St. Clair* v. *Eastern Air Lines*, 194 F. Supp. 623; [*post-Kilberg*]).

Whether we now refuse to apply our prejudgment interest statute because, as we said in the *Marmann* case, "The Legislature had no intention to make it reach so far" (258 N. Y. 447, 450, *supra*) or whether we refuse to do so because our statutory provision authorizing the addition of such interest, like the provision creating the cause of action for wrongful death, "constitute[s] a part of the substantive law of the State" (*Kiefer* v. *Grand Trunk Ry. Co.*, 12 App. Div. 28, 32, *supra*, affd. on opinion below 153 N. Y. 688), the meaning and effect are the same.

Plaintiffs contend, however, that *Kilberg* has changed all this. We there indicated that the courts of this State were free to award damages in excess of the amount limited by a foreign death statute under which the action was brought since "New York's public policy prohibiting the imposition of limits on such damages is strong, clear and old." (N. Y. Const., art. I, § 16; N. Y. Const.

[1894], art. I, § 18)" (9 N Y 2d 34, 39, *supra*). Recognizing "The absurdity and injustice" (*id.*, p. 40) of such limitations, we announced that we would no longer recognize them.

Plaintiffs point to language in the *Kilberg* opinion to the effect that "It is open to us * * * to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies" (9 N Y 2d 34, 41-42, *supra*). Concededly, there is other such language to be found in the opinion. In *Kilberg* the court was confronted with a question of State public policy requiring decision. *Kilberg* and *Wooden* v. *Western N. Y. & Pa. R. R. Co.* (126 N. Y. 10), which we followed in *Kilberg*, must be held merely to express this State's strong policy with respect to *limitations* in wrongful death actions. It is of particular significance that (as was pointed out in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 109) the *Kiefer* case came to us after the decision in *Wooden* (as did the other interest cases) and, by affirming on the opinion in the Appellate Division, "we held that interest had relation to the substance of the right, and must be governed by the foreign statute" (224 N. Y. 99, 199, *supra*).

Consistent with the authorities is the very practical consideration that, if we hold the award of prejudgment interest to be procedural rather than substantive, a New York resident who is compelled to resort to the courts of another State to enforce an action for wrongful death occurring in this State will not be entitled to prejudgment interest, since other States either have no statutory authorization for prejudgment interest (and there are a number of these) or else characterize it as substantive

and therefore not applicable to foreign causes of action. We therefore hold, as we did in *Murmann* v. *New York, N. H. & H. R. R. Co.* (258 N. Y. 447, 450, *supra*), that section 132 of the Decedent Estate Law must be read with sections 130 and 131, and cannot be severed therefrom.

The judgment appealed from should be affirmed, with costs.

Chief Judge DESMOND (concurring). I concur in the result only, since much of the discussion in the majority opinion is inconsistent with our stated grounds for decision in *Kilberg* v. *Northeast Airlines* (9 N Y 2d 34). The result here is correct, however, since there is no New York public policy or other bar to our following Maryland's law as to interest on a recovery for a wrongful death in Maryland.

FROESSEL, J. (dissenting). I do not see how we can affirm here in the light of *Kilberg* v. *Northeast Airlines* (9 N Y 2d 34). Section 132 of the Decedent Estate Law, implementing section 16 of article I of our State Constitution, expressly provides that as to a final judgment in a death action "the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment". We have held that this statute "requires addition to the verdict *as part of the damages* of interest from the date of death to verdict" (emphasis supplied). (*Cleghorn* v. *Ocean Acc. & Guar. Corp.*, 244 N. Y. 166, 167; see, also, *Welsh* v. *Peerless Cas. Co.*, 8 A D 2d 373, 376, affd. 8 N Y 2d 745.) And in *Kieter* v. *Grand Trunk Ry. Co.* (12 App. Div. 28, 32, affd. on opinion below 153 N. Y. 688), it was held: "The right to interest is inseparable from the right to damages".

Inasmuch as the majority of this court in *Kilberg* (*supra*, pp. 41-42) decided that it is open to us, "particularly in view of our own strong public policy as to death action damages, to treat the measure of damages in this case as being a procedural or remedial question controlled by our own State policies", and that despite the limitations contained in the Massachusetts wrongful death statute (Gen. Stats. of Mass., ch. 229, § 2), such action may be enforced in this State "without regard to the $15,000 limit", logic and reason dictate that interest, an inseparable part of the damages, was properly allowed here by the Trial Judge. I would, therefore, modify the judgment of the Appellate Division by reinstating the amended judgment of the trial court.

Judges FULD, VAN VOORHIS, BURKE and FOSTER concur with Judge DYE; Chief Judge DESMOND concurs in a separate memorandum; Judge FROESSEL dissents in a separate opinion.

Judgment affirmed.